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Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH M. SCHEIDLER, TIMOTHY MURPHY, ANDREW SCHOLBERG, THE PRO-LIFE ACTION LEAGUE, INC., RANDALL A. TERRY, OPERATION RESCUE, AND PROJECT LIFE,

Petitioners,

v.

DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., SUMMIT WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does social protest that diminishes commercial business constitute Hobbs Act extortion, as a RICO predicate act, when, contrary to the plain language of the Hobbs Act, there are no allegations that the protestors "obtained" any property from the business, its employees, or its customers?

2. Does the application of Hobbs Act extortion to lawful social protest because it diminishes business violate the First Amendment when there are no allegations that the protestors "obtained" any property?

3. Did the court of appeals err by failing to follow the rule of *Brown v. Allen*, 344 U.S. 443 (1953), that an original, valid judgment must be affirmed on alternative grounds even though the lower court relied upon a wrong ground or gave a wrong reason?

PARTIES TO THE PROCEEDINGS *

In addition to the parties listed in the caption, the following were parties to the proceedings in the court below: plaintiff-appellant, the National Organization for Women (NOW), and defendant-appellees John Ryan, the Pro-Life Direct Action League (PDAL), Vital-Med Laboratories, Inc., Conrad Wojnar, and Monica Migliorino Miller.

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* Pursuant to Supreme Court Rule 29.1, none of the Petitioners has any parent or subsidiary corporation.

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JOSEPH M. SCHEIDLER, TIMOTHY MURPHY, ANDREW SCHOLBERG, THE PRO-LIFE ACTION LEAGUE, INC., RANDALL A. TERRY, OPERATION RESCUE, AND PROJECT LIFE,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' unpublished order of May 16, 1994, remanding the case to the district court, is reported at 25 F.3d 1053 (7th Cir. 1994) (Appendix 1a (hereafter App.). The district court's original order of dismissal of May 29, 1991 is published at 765 F. Supp. 937 (N.D.Ill. 1991). The court of appeals' decision of June 29, 1992, affirming the district court's dismissal, is published at 968 F.2d 612 (7th Cir. 1992). This Court's opinion reversing and remanding is published at 114 S.Ct. 798 (1994).

JURISDICTION

The judgment order of the court of appeals was entered on May 16, 1994. App. 1a. A timely petition for rehearing with suggestion for rehearing *en banc* was filed in the Seventh Circuit on May 27, 1994 and denied on September 12, 1994. App. 7a. The jurisdiction of this Court is conferred under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. § 1962, the Racketeer Influenced and Corrupt Organizations Act (RICO) provides, in pertinent part:

> . . .
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(c), (d) (1988).

The Hobbs Act provides, in pertinent part:

> (1) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, fear or under color of official right.

18 U.S.C. § 1951(b)(2) (1988).

STATEMENT OF THE CASE

1. This eight-year-old litigation began in June, 1986, when Respondents, two abortion businesses, filed a one-count class-action complaint under the federal antitrust laws in the District of Delaware (No. 86 C 263) against Petitioners, certain anti-abortion protestors and organizations. The suit was voluntarily dismissed. Respondents (hereafter "the businesses") refiled their single-count complaint in the Northern District of Illinois on October 17, 1986 (No. 86 C 7888). They sought nationwide declaratory and injunctive relief against Petitioners. No class was ever certified (R. 61, 73, 76).

The businesses pursued extensive discovery nationwide for more than four years, reviewing hundreds of tapes, files, and correspondence of Petitioners and numerous others. Depositions were taken in at least seven cities, including Chicago, Illinois; Fargo, North Dakota; Fort Wayne, Indiana; St. Louis, Missouri; Durham, North Carolina; Jacksonville, Florida; and Washington, D.C. At least thirteen depositions—including depositions of the named defendants Scheidler (September 24, 1987, September 27, 28, 1990), Ryan (October, 1987), Murphy (December, 1988), Scholberg (July, 1988), Migliorino (July, 1990), Wojnar (March, 1990) and Terry (January 9, 10, 11, 1991)—were taken either before the clinics filed their second amended complaint in September, 1989 (R. 236) or before they filed their RICO Case Statement in March, 1991 (R. 469).

2. The clinics filed a first amended complaint on February 2, 1989, which added alleged violations of RICO, 18 U.S.C. § 1962, in addition to the original antitrust allegations, and added prayers for treble damages (R. 155). The sole RICO predicate act alleged was Hobbs Act extortion, 18 U.S.C. § 1951.

The first amended complaint also added new defendants, including Randall Terry, Andrew Scholberg, Timothy Murphy and Vital-Med Laboratories, alleged new

conspiracies and added three new pendent state claims. The conspiracy allegations were so broadly drawn that the clinics later claimed that they embraced hundreds or even thousands of co-conspirators. Motions to dismiss were filed and denied.

3. After nearly three years of discovery, the clinics filed a Second Amended Complaint on September 22, 1989 (hereafter "the Complaint"). App. 61a.[1] Respondents alleged that Petitioners commit "extortion" whenever they adversely affect the business of abortion clinics. Specifically, they alleged that Petitioners violated the Hobbs Act by engaging in "unlawful, concerted action, including repeated acts of trespass . . . and vandalism directed at women's health centers. . . ." (¶¶ 27, 97-98). The businesses never alleged in their Complaint or RICO Case Statement that any defendant or co-conspirator obtained, attempted to obtain or demanded any property from either clinic or any doctor, patient or prospective patient of either clinic. This is confirmed by the allegation in the RICO Case Statement that the only "income" or "benefits" that the demonstrators received came from donations (¶¶ 6, 9) or from the sale of books and materials (¶ 14(a)), and not from the clinics, employees, or women seeking abortions.

4. On August 29, 1990, nearly four years after the case was first filed, certain Petitioners filed a motion to dismiss the Second Amended Complaint or, in the alternative, for a more definite statement (R. 335). While that motion was pending, Respondents filed a motion to set a ruling date, and Petitioners filed a cross motion for oral argument and for an order requiring that Respondents file a RICO Case Statement under FRCP 16 (R. 360). In February, 1991, the court ordered the clinics

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[1] As this Court concluded, only the two abortion clinics (DWHO and SWHO) have sued under RICO. The National Organization for Women (NOW) is *not* a RICO plaintiff. *National Organization for Women v. Scheidler*, 114 S.Ct. 798, 802 & n.3 (1994).

to file a RICO Case Statement which was to include "the facts the plaintiffs are relying upon to initiate each RICO claim as a result of the 'reasonable inquiry' required by Fed. R. Civ. P. 11," (R. 430) and "the alleged predicate acts and the specific statutes which were allegedly violated." (R. 430, ¶ 5(a)).

5. Respondents filed their RICO Case Statement on March 18, 1991, which included 29 pages of text and two appendices of 41 and 36 pages, respectively. Although the Complaint alleged sporadic acts of trespass, vandalism, assault, battery, and theft by the demonstrators, other defendants, or unnamed "co-conspirators" (App. 61a, ¶¶ 2, 27, 40, 42, 46-50, 61, 64, 67, 74, 97-98), there is not one allegation in the Complaint itself of bombing or arson by any defendant or any "co-conspirators." In fact, the words "bombing" and "arson" do not even appear in the Complaint.

The RICO Case Statement referred to incidents of bombing and arson for the first time. In the body of the Case Statement, there are only three references to bombing or arson, none of which refers to any named individual defendant. (*See* ¶ 5(e), ¶ 5(f)(1), and ¶ 5(f)(2)). The references to bombing and arson are never alleged to be independent predicate acts, nor are any state or federal arson or bombing statutes alleged to have been violated. Indeed, all predicate acts listed in Exhibits A and B of the RICO Case Statement are alleged to "violate the Hobbs Act" only (*see* ¶ 5(f)(1)).

In Exhibit A to the RICO Case Statement, there is only one reference to "arson" and this to "Operation Rescue" as a "co-conspirator" and one reference to Joseph Scheidler as having "conspired with others to firebomb clinics" in Anaheim, California on June 28, 1980. There are no allegations that any named defendant, including Scheidler, committed arson or bombing, nor any specific allegations that Scheidler or any other named defendant acted or agreed with any named co-conspirator to com-

mit acts of arson or bombing. There are only references to so-called "co-conspirators" committing acts of arson or bombing, but none is alleged to have conspired with any of the named defendants.[2] This is the sum total of such allegations in this case. As the court of appeals emphasized in its May 16, 1994 judgment order, the sole RICO predicate act alleged in the Complaint and RICO Case Statement is Hobbs Act extortion. App. 4a.

6. On May 28, 1991, the district court, relying on both the Complaint and the RICO Case Statement, granted Petitioners' motion to dismiss, holding that Respondents failed to state a claim under RICO on the sole rationale that RICO requires an economic motive, and dismissed the case in its entirety. 765 F. Supp. at 941. The district court also concluded that Petitioners' motive "was not to obtain money, but rather to otherwise further their antiabortion cause by limiting the availability of abortion services and winning publicity for their cause." 765 F. Supp. at 944. Respondents never asked the court for leave to amend under FRCP 59 or 60 or 15(a). They stood on their Complaint and appealed.

7. The court of appeals unanimously affirmed. 968 F.2d 612 (7th Cir. 1992). This Court granted certiorari limited to Question 1 in the Petition (the RICO question), 113 S.Ct. 2958 (1993), and thereafter reversed,

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[2] Although Respondents allege that the predicate acts involve distinct parties (RICO Case Statement, ¶ 5(g), sub par. 2) and that various "co-conspirators" have committed acts of violence, they never allege any participation, agreement, association in such acts by the named defendants (four references to Don Benny Anderson for "firebombing," "arson," "bombing" and "kidnapping" as a co-conspirator; four references to Curtis Beseda for "arson" and "firebombing"; twelve references to Michael Bray for "arson" and "bombing"; one reference to Peter Burkin for "arson"; one reference to Carl Genera; four references to Charles Cheshire; four references to Matthew Goldsby; one reference to Joseph Grace; four references to David Holman; one reference to Sam Lee; five references to Marjorie Reed; eight references to James or Kathren Simmons; three references to Kay Wiggins).

holding that RICO does not require proof of an economic motive. 114 S.Ct. 798 (1994).

8. On remand, Petitioners asked the court of appeals to reaffirm the original judgment of dismissal on the alternative grounds that the Complaint failed to state a RICO claim because no valid predicate act of extortion was pled and that application of Respondents' construction of Hobbs Act extortion would violate the First Amendment rights of Petitioners. In its judgment order of May 16, 1994, the court of appeals reaffirmed the original dismissal of plaintiffs' Complaint as to Count I (the Sherman Antitrust Act) and II (RICO, 18 U.S.C. § 1962(a)). App. 4a. However, with respect to Counts III (RICO, 18 U.S.C. § 1962(c)) and IV (RICO, 18 U.S.C. § 1962(d)), the Court acknowledged that these questions remained to be decided but declined to address them. App. 4a. Instead, the court of appeals remanded the case to the district court with the following directions; first, to address whether the allegations of the Complaint are sufficient to state a claim for extortion under the Hobbs Act; and, second, if necessary, to "consider which of the defendants' activities, as alleged, are protected by the First Amendment. . . ." App. 4a. The court emphasized in its judgment order that Hobbs Act extortion is "the sole predicate act alleged by plaintiffs in both their complaint and their RICO Case Statement." App. 4a. On September 12, 1994, the court denied Petitioners petition for rehearing. App. 7a-8a.

REASONS FOR GRANTING THE WRIT

This case, like many others throughout the country, involves the misuse of civil RICO against social protestors nationwide. This federal litigation has proceeded interminably for more than eight years without any court decisively addressing the critical question repeatedly raised and now presented in this Petition: Does social protest that diminishes commercial business constitute "extortion" for purposes of the Hobbs Act (as a predicate act under RICO), where there is no allegation that defendants "obtained" any property from plaintiffs, as required by the plain language of the Hobbs Act?

Through an elaborately contrived interpretation of the Hobbs Act, Respondents have bootstrapped allegations of what are, at most, state torts and misdemeanors into predicate acts under RICO in order to obtain federal jurisdiction and a nationwide injunction against social protestors. The Complaint fails to state a claim because no valid RICO predicate act has been alleged.

The only RICO predicate act nominally alleged, as the court of appeals emphasized in its judgment order of May 16, 1994, is Hobbs Act extortion. 18 U.S.C. § 1951; App. 4a. The plain language of the Hobbs Act requires an "obtaining" of property as an essential element of extortion. *Evans v. United States*, 112 S.Ct. 1881 (1992). Yet, Respondents have never alleged that Petitioners obtained any property from the clinics, their employees, or their patients. Indeed, as the district court concluded in dismissing the Complaint, the motivation of Petitioners "was not to obtain money. . . ." *National Organization for Women v. Scheidler*, 765 F. Supp. 937, 944 (N.D.Ill. 1991).

This same misuse of RICO and the Hobbs Act against social protestors—with no allegation of "obtaining" of property—has been raised in approximately sixteen cases in eight of the federal circuits over the past eight years without definitive resolution. The latest RICO-Hobbs Act

case—with a complaint of 150 pages—was filed this past summer. *Applegate v. Doe*, No. 94-1247 (W.D.Pa. filed July 27, 1994). This abuse of RICO will continue until this Court settles the question.

This appeal presents the question for resolution more directly and precisely than any case in the federal system. Hobbs Act extortion is the only RICO predicate act alleged. There is a direct conflict between the allegations in Respondents' Second Amended Complaint and RICO Case Statement and the plain language of the Hobbs Act. Respondents never alleged an essential element of extortion—the obtaining of property. The clinics had four years, with extensive discovery, to try to plead a real RICO-Hobbs Act extortion case. They spurned that obligation.

Outside of the context of social protest, the federal district and circuit courts have routinely applied the plain language of the Hobbs Act, acknowledging that Hobbs Act extortion requires "obtaining." But when it comes to social protest, the plain language has been ignored. The Third Circuit upheld the application of Hobbs Act extortion against social protestors five years ago in *Northeast Women's Center, Inc. v. McMonagle,* 868 F.2d 1342 (3d Cir.), *cert. denied,* 493 U.S. 901 (1989). Although that decision stands alone in conflict with the body of federal extortion law, the theory upheld in *McMonagle* continues to generate new RICO lawsuits.

If social protest that "deprives" an industry of business constitutes "extortion," it would apply to protest against any industry that had an effect on business—environmentalists against the logging industry, AIDS activists against medical organizations, animal rights activists against fur manufacturers and stores, and peace activists against the military weapons industry. If RICO incorporated such an unprecedented definition of extortion, and were applied to chill or criminalize lawful protest, RICO would be unconstitutional under clear standards of First Amend-

ment jurisprudence. *See e.g., NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982); *Chicago Police Dept. v. Mosley,* 408 U.S. 92 (1972).

The court of appeals erred by ignoring the rule of *Brown v. Allen,* 344 U.S. 443 (1953), and failing to affirm the dismissal on the alternative grounds presented. Petitioners are entitled to the benefit of the original, valid judgment of dismissal, and the court of appeals' remand, without considering the alternative grounds presented, effectively vacated the original judgment without justification.

Certiorari should be granted and the district court's judgment of dismissal should be affirmed. In the alternative, certiorari should be granted, the judgment of the court of appeals remanding the case should be vacated, and the case remanded to the court of appeals for consideration of the alternative grounds presented.

I. SOCIAL PROTEST THAT DIMINISHES COMMERCIAL BUSINESS DOES NOT CONSTITUTE "EXTORTION" UNDER THE HOBBS ACT, AS A PREDICATE ACT UNDER RICO, WHERE THE PROTESTORS NEVER OBTAINED ANY PROPERTY FROM THE BUSINESS, ITS EMPLOYEES, OR ITS CUSTOMERS.

This is no more a RICO case than it is an antitrust case. *See National Organization for Women v. Scheidler,* 968 F.2d 612 (7th Cir. 1992) (dismissal of antitrust claim affirmed), *cert. denied,* 113 S.Ct. 2958 (1993). This is one of a pattern of many cases nationwide which bootstrap state pendent claims against social protestors into federal court based on a distortion of federal civil RICO. Abortion businesses cannot drag social protestors into federal court under RICO without properly pleading predicate acts. 18 U.S.C. § 1962(c). Although elaborately decorated with allegations of "violence," the complaint and RICO Case Statement in this case pled only

Hobbs Act extortion.[3] Yet, the businesses failed to plead even that because they never alleged that Petitioners obtained any property of the businesses or of their employees, patients or prospective patients.

A. This Misuse of the Hobbs Act Conflicts with the Plain Language of the Statute.

Respondents' theory that extortion includes mere deprivation of business contradicts the plain language of the Hobbs Act. The Hobbs Act explicitly defines "extortion" as:

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, fear or under color of official right.

18 U.S.C. § 1951(b)(2). To "obtain" means "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way." *Black's Law Dictionary* 972 (5th ed. 1979). Under the common law, "obtaining" meant a trespassory taking.

Respondents have spurned the necessity to plead any allegation of obtaining of property. This case, and others like it throughout the country, have persisted in the courts despite this flagrant disregard of the plain requirements of the Hobbs Act.

B. This Misuse of the Hobbs Act Conflicts with the Court's Decision in *Evans v. United States*.

Respondents' theory of "extortion" also collides with a uniform line of Supreme Court precedents interpreting the Hobbs Act. All hold that the text and common law background govern interpretation of the Hobbs Act. In *Evans v. United States*, 112 S.Ct. 1881 (1992), the Court unanimously agreed that "extortion" under the Hobbs Act must

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[3] As the court of appeals noted in its May 16, 1994 judgment order, the only RICO predicate act alleged is Hobbs Act extortion. App. 4a.

be interpreted in light of its common law meaning. The Court held that Congress "intended to adopt" the common law meaning of extortion in the Hobbs Act. *Id.* at 1885. The text and common law background require the element of "obtaining" or "taking" in the definition of extortion. *Id.* at 1885 n.4.

Likewise, this Court's decision in *United States v. Green*, 350 U.S. 415, 418-20 (1955), clearly recognized and preserved the distinction between "obtaining" and "personal benefit." There, the defendant was a union representative whose threats served to *obtain* jobs for the employees whom he represented. The Court cited the Hobbs Act definition of extortion and noted, "The extortions alleged consisted of attempts to obtain. . . ." *Id.* at 417 & 418 n.2. This Court drew the critical distinction that "extortion as defined in the statute in no way depends upon having a *direct benefit* conferred on the person who *obtains* the property." *Id.* at 420 (emphasis added). Obtaining is a key requirement of extortion even if the extorter receives no personal benefit. *See also United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (citing New York law noting the "obtaining" element); *Stirone v. United States*, 361 U.S. 212, 218 (1960) ("there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage").

II. THERE IS A CONFLICT IN THE CIRCUITS ON WHETHER "OBTAINING" OF PROPERTY IS REQUIRED FOR HOBBS ACT EXTORTION.

This case presents a direct conflict between the Third Circuit and nearly every other Circuit. The federal circuits are nearly uniform in holding that Hobbs Act extortion requires obtaining. In *Palmer v. Nationwide Mut. Ins. Co.*, 945 F.2d 1371, 1375 (6th Cir. 1991), the Sixth Circuit affirmed the dismissal of a RICO claim

against an insurance company and other defendants for the failure to cover certain expenses arising out of an auto accident. As the court noted, "Plaintiffs use the term 'extort' and 'extortion' for certain actions of defendants, yet they make no claim of any payments made by them to, or sought from them by, the various defendants." In *Elliott v. Foufas*, 867 F.2d 877, 882 (5th Cir. 1989), the Fifth Circuit affirmed the dismissal of a RICO-Hobbs Act claim by a condominium sales agent who alleged that she had been defrauded of real estate commissions, concluding that " 'extortion' means obtaining property from another, with his consent, induced by actual or threatened force, violence or fear. Elliott admits in her complaint that no one 'took' her commissions with her consent." [4]

The Third Circuit's decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), stands alone in holding that the Hobbs Act, as a RICO predicate act, applies even where no obtaining of property is alleged or proven. There the court upheld a civil RICO judgment based entirely "on the destruction of the Center's medical equipment during one of the incidents of forcible entry into the Center." *Id.* at 1349. *See also Id.* at 1350 ("The Center's extortion claim was that Defendants used force, threats of force, fear and violence in their efforts to force the Center out of business."). This Court should resolve this conflict which perpetuates this abuse of RICO-Hobbs Act.

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[4] *See also, Printers II v. Professional Pub. Inc.*, 615 F.Supp. 767, 773 (D.N.Y. 1985), *aff'd on other grounds*, 784 F.2d 141 (2d Cir. 1986); *Viacom Intern. Inc. v. Icahn*, 747 F.Supp. 205, 210-13 (S.D.N.Y. 1990), *aff'd on other grounds*, 946 F.2d 998 (2d Cir. 1991); *Nedley v. United States*, 255 F.2d 350, 355-58 (3d Cir. 1958); *United States v. Arambasich*, 597 F.2d 609, 611 (7th Cir. 1979) ("[t]he statute reaches the wrongful use of fear of financial harm to obtain property"); *United States v. Burke*, 781 F.2d 1234, 1244 (7th Cir. 1985) ("[e]xtortion is the wrongful use of economic fear to obtain money").

III. APPLICATION OF RESPONDENTS' AMORPHOUS THEORY OF EXTORTION WOULD CHILL THE FIRST AMENDMENT LIBERTIES OF PROTESTORS AND THREATEN TO ENGULF ALL SOCIAL PROTEST AIMED AT COMMERCIAL BUSINESS IN FEDERAL RICO LITIGATION.

A construction of the Hobbs Act that is properly limited by the plain language and common law background to require obtaining is constitutionally mandated. The original dismissal of Respondents' complaint here was clearly justified because its plain allegations, the ongoing eight years of litigation, and the proliferation of similar cases across the country without resolution have cast a deep chill over the exercise of clear First Amendment rights by American citizens who quite reasonably fear extended RICO litigation merely for organizing lawful protests which may have the effect of diminishing business.

First Amendment expression permeates the activities of the Petitioners. The activities alleged include sidewalk counseling, picketing, press conferences, leafletting, demonstrations, and counter-demonstrations, "blitzes," rallies, marches, advertising, speeches, press conferences, religious services, blockades, and sit-ins (App. 61a, ¶¶ 2, 11, 35, 38, 40, 48-50, 55-56, 59-60, 73, 98, 125). Respondents' Complaint was properly dismissed because it is based upon an illegitimate theory of extortion that threatens protected speech and protest, indiscriminately lumps together constitutionally protected and unprotected conduct, and makes vague, conclusory allegations of conspiracy.

Respondents' Complaint implicates the First Amendment rights of Petitioners because the businesses allege that *all* of the demonstrators' activity is "extortionate" merely because it affects the economic and non-economic interests of Respondents' employees, doctors, patients and prospective patients. In addition, the businesses failed to make any distinction between legal or illegal activity when they sought injunctive relief aimed at enjoining the demonstrators *both* "from carrying out a concerted effort to

drive women's health centers . . . out of business" *and* from "using illegal means to drive women's health centers out of business." App. 61a, ¶ 93. The businesses characterize all of the activities alleged in the Complaint as "extortionate" (App. 61a, ¶¶ 97-98)—because all of the activities can have an effect in "depriving" the businesses of revenue—and then ask the court to enjoin Petitioners from "carrying out a concerted effort" of such "extortionate" acts to drive the Respondents out of business (App. 61a, Count I, Prayer 3).

However, peaceful protest to influence or even disrupt merchants and their business is squarely protected by the First Amendment. *See e.g., DeBartolo v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 576 (1988) (union handbilling against businesses in shopping malls); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982) (boycott of merchants); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (leafletting against racially discriminatory real estate practices).[5] When protest activities are called "extortion" because they may "deprive" clinics of business, such characterizations collide with the First Amendment. Moreover, such an unconstitutional application of "extortion" to chill protest obviously could not be limited to anti-abortion protests.

Under Respondents' theory, every social protest that steps outside the First Amendment and includes acts of civil disobedience becomes, *ipso facto*, a RICO/Hobbs Act extortion case, justifying federal jurisdiction. In this

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[5] *See also Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 311 & 320 n.9, 324-25 (1968) (employees of competitors picketing nonunionized stores); *NLRB v. Fruit and Veg. Packers*, 377 U.S. 58, 63 (1964) (picketing to reduce second employer's sales) ("[b]oth the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment"); *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (picketing intended "to induce the customers not to patronize the employer").

way, Respondents transmute what are at most allegations of state torts and misdemeanors into federal RICO. However, just because some protest may not be constitutionally protected does not mean it falls within the Hobbs Act. None of the alleged conduct of Petitioners—legal or illegal—falls under the Hobbs Act because there are no allegations that Petitioners obtained property.

These cases have proliferated since the Court denied certiorari in *McMonagle*. Several similar RICO cases—all relying at least in part on the RICO predicate act of Hobbs Act extortion—are pending in the other circuits. An appeal raising this issue is awaiting decision in the Ninth Circuit thirty months after oral argument.[6] Other cases raising this issue are pending in the Fourth Circuit[7] and in the Eleventh Circuit.[8] Several other cases have been filed in federal district courts around the country.[9]

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[6] *See Feminist Women's Health Center v. Roberts*, No. C86-161 (W.D.Wash. March 11 and May 3, 1988) (1988 WL 156656), *subsequent opinion*, No. C86-161Z (W.D. Wash. May 4, 1989) (1989 WL 56017), *appeal pending*, Nos. 90-35266 and 90-35298 (9th Cir. argued Feb. 5, 1992, and still pending).

[7] *See Palmetto State Medical Center, Inc. v. Operation Rescue*, No. 6:89-2548 (D.S.C.) (awarding $25,000 in RICO damages, trebled by district court), *appeal dism'd for want of app. juris., Palmetto State Medical Center, Inc. v. Operation Rescue*, —— F.3d ——, 1994 WL 468123 (4th Cir. 1994) (per curiam). Another federal RICO claim filed in state court in the 4th Circuit was voluntarily dismissed. *See Kaplan v. Prolife Action League of Greensboro*, 111 N.C.App. 1, 431 S.E.2d 828 (N.C.App. 1993), *motion to dismiss allowed, review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *cert. denied sub. nom. Winfield v. Kaplan*, 114 S.Ct. 2783 (1994).

[8] *See Lucero v. Operation Rescue of Birmingham*, 772 F. Supp. 1193 (N.D.Ala. 1991), *aff'd*, 954 F.2d 624 (11th Cir. 1992), *rehearing en banc denied*, 961 F.2d 224 (11th Cir. 1992), *subsequent opinion*, No. CV91-PT-1082-S, 1993 WL 503112 (N.D.Ala. Apr. 1, 1993), *appeal pending*, No. 93-6567 (11th Cir. argued Sept. 22, 1994).

[9] *See, e.g., Libertad v. Welch*, 1993 WL 661471 (D.P.R. Nov. 1, 1993) (denying preliminary injunction); *Town of Brookline v.*

This case presents the issue most directly, however. Hobbs Act extortion is not intertwined with allegations of other predicate acts but is the only RICO predicate act pled. The fundamental defect appears on the face of the complaint. Respondents were allowed plenty of time to make their case—filing two amended complaints and a RICO Case Statement before the case was dismissed in 1991.

Compounding this distortion of RICO, Respondents' ambiguous and conclusory charges of conspiracy have been particularly threatening to free speech and association. The centerpiece of the Complaint is Joseph Scheidler's "manual" on protest activities, *Closed: 99 Ways to Stop Abortion* (1985) (App. 61a, ¶¶ 28-29; R. 109 (exhibit)). This book is at the center of the Respondents' "conspiracy" allegations. Because of this book, Respond-

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Operation Rescue, 762 F.Supp. 1521 (D.Mass. 1991); *Town of West Hartford v. Operation Rescue*, 726 F.Supp. 371, (D.Conn.), *vac. and remanded*, 915 F.2d 92 (2d Cir. 1990), *on remand*, 792 F.Supp. 161 (D.Conn. 1992), *vacated*, 991 F.2d 1039 (2d Cir.), *cert. denied sub. nom. Sylversen v. Summit Women's Center West*, 114 S.Ct. 185 (1993); *Allegheny Women's Center v. Operation Rescue*, No. 89-0792 (W.D.Pa. closed Apr. 30, 1991); *North Highland Bldg. Corp. v. Operation Rescue*, No. 88-2121 (W.D.Pa. dismissed Aug. 28, 1989); *Roe v. Operation Rescue*, 730 F.Supp. 656 (E.D.Pa. 1989), *aff'd*, 920 F.2d 213 (3d Cir. 1990); *West Carolina Medical Clinic, Inc. v. Operation Rescue*, No. AC-89-140 (W.D.N.C. dismissed Feb. 22, 1990); *Volunteer Medical Clinic, Inc. v. Operation Rescue*, No. CIV 3-89-156 (E.D. Tenn. May 19, 1989), *opinion on appeal from preliminary injunction*, 948 F.2d 218, 228 (6th Cir. 1991) (remanding for further proceedings on RICO claim); *Michiana Abortion Clinic v. Kirts*, No. 4:91 CV 60 (W.D.Mich. filed April 24, 1991); *Women's Pavilion, Inc. v. Moriarty*, No. 3:91CV7250 (N.D. Ohio Dec. 23, 1992) (summary judgment was granted for the defendants on the rationale that RICO required an economic motive, no appeal was taken); *Fort Wayne Women's Health Organization v. Brane*, No. F90-066 (N.D.Ind. May 8, 1990), *prior order*, 734 F.Supp. 849 (N.D.Ind. 1990); *Webster v. Operation Rescue*, No. 91-C-20138, 1992 WL 281366 (N.D.Ill. Oct. 9, 1992); *Birmingham Women's Medical Center, Inc. v. Operation Rescue*, No. CV89-P-1261-S (N.D.Ala. closed Feb. 27, 1990).

ents attribute virtually every action that happens outside an abortion business in the United States to Petitioner Scheidler as part of "the conspiracy." Although no underlying RICO predicate act has been pled, vague charges of conspiracy in a complaint of 132 paragraphs, combined with the complexity of the RICO statute and allegations of state torts and misdemeanors, have served to confuse the courts, lengthen this litigation, and preclude efficient disposition. Here, Respondents have effectively abused the "chameleon-like" character of conspiracy law (*Cf. Krulewitch v. United States*, 336 U.S. 440, 447-49 (1949) (Jackson, J.)), and they should not be allowed to persist in their indiscriminate labeling of the protestors when the Complaint and the RICO Case Statement fail to state a federal claim and squarely touch First Amendment activity.

The need to require specific pleading is especially appropriate here because allegations of lawful protest are intertwined with allegations of illegal activity. "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Even if the clinics could charge that a particular alleged co-conspirator had engaged in RICO cognizable conduct, "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 908, 925 n.68 (1982). Even "speech that is patently offensive and is intended to inflict emotional injury" is entitled to First Amendment protection. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). Barefaced and undifferentiated assertions of conspiracy, unaccompanied by the flesh and bone of fact, cannot be squared with the

"precision of regulation" required by *Claiborne Hardware*.

Consequently, the First Amendment not only requires a narrow construction of RICO but also a heightened standard of pleading. Respondents failed to provide that precision. Courts in nearly all circuits have adopted the rule of *Franchise Realty v. S.F. Loc. Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977):

> [I]n any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

Id. at 1082-83.[10] This standard is required because the courts have "consistently recognized the sensitivity of First

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[10] Courts in all but two circuits (the Federal and the Fourth) have adopted the *Franchise Realty* standard. *D.C.*: *Federal Prescription Service v. Amer. Pharm. Assoc.*, 471 F.Supp. 126, 129 (D.D.C. 1979); *First*: *Cash Energy Inc. v. Weimer*, 768 F.Supp. 892, 899 (D.Mass. 1991); *Second*: *Caplan v. American Baby Inc.*, 582 F.Supp. 869, 871 (S.D.N.Y. 1984) (copyright and trademark); *WIXT Television v. Meredith Corp.*, 506 F.Supp. 1003, 1035 (N.D.N.Y. 1980); *Third*: *City of Newark v. Delmarva Power & Light*, 497 F.Supp. 323, 326-27 (D.Del. 1980); *Fifth*: *Spanish Intern. v. Leibowitz*, 608 F.Supp. 178, 182-84 (S.D.Fla. 1985); *St. Joseph's Hospital v. Hosp. Auth. of America*, 620 F.Supp. 814, 833 & n.22 (D.Ga. 1975); *City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258, 1266-67 (S.D.Fla. 1980). *Sixth*: *Letica Corp. v. Sweetheart Cup Co., Inc.*, 790 F.Supp. 702, 705-06 (E.D.Mich. 1992); *Seventh*: *Premier Elec. Cons. Co. v. Int'l Brotherhood*, 627 F.Supp. 957, 966 (N.D.Ill. 1985), *rev'd on other grounds*, 814 F.2d 358 (7th Cir. 1987); *Eighth*: *Mark Aero Inc. v. Transworld Airlines*, 580 F.2d 288 (8th Cir. 1978); *Ninth*: *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991); *Tenth*: *Hydro-Tech. Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982); *Eleventh*: *Spanish Intern. v. Leibowitz*, 608 F.Supp. 178, 183-84 (D.Fla. 1985); *St.*

Amendment guarantees to the threat of harassing litigation, and ha[ve] erected safeguards for those guarantees." [11]

Justices Souter and Kennedy recognized as much in their concurrence in *National Organization for Women v. Scheidler*. They noted that "[c]onduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity entitling the defendant to *dismissal* on that basis." *NOW v. Scheidler*, 114 S.Ct. at 807 (emphasis supplied) (citing *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 536 (9th Cir. 1991) (applying *Franchise Realty* heightened pleading standard)). The district court rightly terminated this litigation on the merits and that judgment must be affirmed under the rule of *Brown v. Allen*.

IV. THE COURT OF APPEAL'S REFUSAL TO AFFIRM ON ALTERNATIVE GROUNDS VIOLATED IMPORTANT RULES OF JUDICIAL ECONOMY AND CONFLICTS WITH THE RULE OF VIRTUALLY EVERY OTHER CIRCUIT.

Although Respondents' failure to plead a RICO claim appears on the face of the Complaint and was briefed before the court of appeals in the original appeal and on remand from this Court, the court refused to consider whether the order of dismissal should be affirmed on the alternative grounds raised by Petitioners. The court erred by ignoring the rule of *Brown v. Allen*, 344 U.S. 443 (1953), and remanding this case to the district court without consideration of the alternative ground for affirmance.

Joseph's Hospital v. Hosp. Auth. of America, 620 F.Supp. 814, 833 & n.22 (D.Ga. 1975).

[11] *Franchise Realty*, 542 F.2d at 1082. *See generally*, P. Areeda, *Antitrust Law* ¶ 203.4b (1982 Supp.).

This Court has held that "[i]n the review of judicial proceedings the rule is settled that, if the decision below is correct, it *must* be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Brown v. Allen*, 344 U.S. 443, 459 & n.8 (1953) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (emphasis supplied)). The reason for this rule was stated by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943):

> It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.

See also J.E. Riley Inv. Co. v. Commissioner, 311 U.S. 55, 59 (1940); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924) ("We conclude that the judgment was right, although a wrong reason was given for it."). The function of appellate courts is "to review final judgments, not to pass upon the cogency or lack thereof of any particular rationale upon which the district court may rely." *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976).

The court of appeals' decision below, refusing to affirm on alternative grounds, conflicts with the rule of virtually every other circuit. The rule that a decision must be affirmed on any alternative ground that will support it is uniformly followed throughout the courts of appeals.[12] The application of this rule here particularly

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[12] *See, e.g., Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1230 (D.C. Cir. 1991) (appellants erred in not briefing alternative grounds for affirming dismissal for failure to state a claim upon which relief could be granted); *Doe v. Gates*, 981 F.2d 1316, 1321-22 (D.C. Cir. 1993), *cert. denied sub nom. Doe v. Woolsey*, 114 S.Ct. 337 (1993) (citing rule); *In re Public Service Co. of New Hampshire*, 879 F.2d 987, 989 (1st Cir. 1989) ("even if a lower court decision rests entirely upon incorrect reasoning, the lower court judgment should be sustained when the law, as correctly applied, requires the same result"); *United States v.*

serves judicial economy because the defect appears on the face of the complaint and involves pure questions of law.

Remand effectively deprives the prevailing party of the benefit of the original, valid judgment to which the party

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Mendoza-Acevedo, 950 F.2d 1, 3 (1st Cir. 1991) (citing rule); *Lum Wan v. Esperdy*, 321 F.2d 123, 125-26 (2d Cir. 1963); *Conover v. Montemuro*, 477 F.2d 1073, 1082 (3d Cir. 1972) ("[i]f the district court was in error in rejecting the defendant's claims to judicial immunity, . . . we would be required to affirm the dismissal on that basis even though we did not agree with the grounds on which the court acted"); *PAAC v. Rizzo*, 502 F.2d 306, 308 n.1 (3d Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975) ("[i]t is proper for an appellate court to affirm a correct decision of a lower court even when that decision is based on an inappropriate ground"); *Blackwelder v. Millman*, 522 F.2d 766, 772 (4th Cir. 1975) (if a lower court's judgment ending a lawsuit is sustainable on other grounds raised below, "it serves no end to 'reserve' the questions for a later appeal"); *Virginia National Bank v. United States*, 443 F.2d 1030, 1035 (4th Cir. 1971) ("[a] decision should not be rejected or overturned when the correct result is achieved, even though an incorrect reason is assigned as the basis of the decision"): *Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir. 1979) ("it is firmly established that an appellate court must affirm the lower court's judgment if the result is correct even though it is based upon an improper ground"); *Russ Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985) ("[a] decision below must be affirmed if correct for any reason, including a reason not considered by the lower court"); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 281 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981) ("it is well settled that if the result below is correct, it must be affirmed, although the lower court relied on a wrong ground or gave a wrong reason"); *Missouri Public Service Co. v. United States*, 370 F.2d 971, 976 (8th Cir. 1967); *Papish v. Board of Curators of the University of Missouri*, 464 F.2d 136, 141 n.11 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 960 (1973) (citing rule); *Seattle Times Co. v. Seattle Mailer's Union No. 32*, 664 F.2d 1366, 1369 n.2 (9th Cir. 1982) ("[w]hen reviewing the district court's decision we must affirm if the result is correct, even if the trial court relied on a wrong ground or gave a wrong reason"); *Scivally v. Time Insurance Co.*, 724 F.2d 101, 103 (10th Cir. 1983) ("the trial court's decision will be affirmed if the record reveals another ground which supports the decision"); *Collins v. Seaboard Coastline R. Co.*, 681 F.2d 1333, 1335 (11th Cir. 1982) ("[i]f a

was entitled and disables the party from any dispositive ruling on the sufficiency of the complaint. The court of appeals' remand here is a compelling example of that danger. Under the court of appeals' judgment and order of May 16, 1994, the district court is initially required to address Petitioners' argument regarding Hobbs Act extortion and, if necessary, to consider which of Petitioners' alleged acts are protected by the First Amendment. If the district court then properly dismisses the case, Respondents will almost certainly appeal, and the court of appeals will have to decide the issue anyway. On the other hand, if the district court errs by not dismissing the Complaint, Petitioners will have no immediate appellate recourse (since refusal to dismiss a complaint is a non-appealable interlocutory order) and may be compelled to go to trial on an invalid complaint.

In addition, remand to the district court may entail months or years of additional litigation. On remand, the district court may reinstate the original judgment, or it may not, and, if it does not, it may proceed to entertain yet a third amended complaint, thereby allowing Respondents to proceed with an entirely new case, with new legal theories, new claims and new parties. This is a case between ideological opponents. Undoubtedly, Respondents will seek to reopen the case, amend their Complaint, and pursue additional discovery across the country.[13] The Na-

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decision of law is correct, that the lower court incorrectly reasoned its way to that decision is irrelevant on appeal"); *In re Greenbrook Carpet Co. Inc.*, 722 F.2d 659, 660 n.1 (11th Cir. 1984) (citing rule); *Midland Int'l Corp. v. Midland Cooperatives, Inc.*, 434 F.2d 1399, 1402-03 (C.C.P.A. 1970) (citing rule); *Stockton v. Lucas*, 482 F.2d 979, 980 (Temp. Emer. Ct. App. 1973) ("[i]t is well-established law that if the decision of the trial court is sustained by applicable law, the judgment must be affirmed, although the trial court relied upon a wrong ground or gave a wrong reason for its decision").

[13] At a status hearing called by the district court on March 28, 1994, Respondents orally sought to file a motion for leave to file a

tional Organization for Women will seek to insert itself as a new RICO plaintiff. Petitioners will be deprived of the benefit of the original judgment to which they were entitled, and needlessly be subjected to further vexatious, harassing and costly litigation. Interlocutory appeals to the court of appeals to halt further abuse by Respondents may be necessary. *Cf. Casey v. Planned Parenthood*, 15 F.3d 848 (3d Cir. 1994) (Third Circuit blocked effort by plaintiffs to reopen record after Supreme Court had upheld facial validity of state abortion statutes). And, unless Petitioners or their attorneys are bankrupted in the meantime, an appeal back to the court of appeals is almost certain, at which time the issue of Hobbs Act extortion will again be raised. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). The potential prejudice to Petitioners under these circumstances is obvious, imminent, substantial, and irreparable.

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third amended complaint. Petitioners pointed out that the mandate of the court of appeals had not yet issued.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

In the alternative, Petitioners request that this Court grant the petition, vacate the court of appeals' judgment order of May 16, 1994, and remand for consideration of whether the district court's original judgment of dismissal should be affirmed on the alternative grounds presented.

Respectfully submitted,

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October 20, 1994

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Decided May 16, 1994

Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. BRUCE M. VAN SICKLE, District Judge *

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INCORPORATED, on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,

Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, ANDREW D. SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INCORPORATED, PRO-LIFE ACTION LEAGUE, INCORPORATED, PRO-LIFE DIRECT ACTION LEAGUE, INCORPORATED, PROJECT LIFE, and OPERATION RESCUE,

Defendants-Appellees.

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* The Honorable Bruce M. Van Sickle, District Judge of the United States District Court for the District of North Dakota, is sitting by designation.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 86 C 7888—James F. Holderman, Judge

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

ORDER

The plaintiffs, the National Organization for Women, Incorporated, the Delaware Women's Health Organization, Incorporated and the Summit Women's Health Organization, Incorporated, filed this lawsuit against a number of individuals and groups who oppose abortion. The plaintiffs' second amended complaint ("complaint") alleges violations by the defendants of the Sherman Antitrust Act, 15 U.S.C. § 1 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(a), (c), and (d). The complaint also raises several pendent state claims. The district court dismissed the plaintiffs' case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *National Org. for Women v. Scheidler,* 765 F. Supp. 937, 945 (N.D. Ill. 1991). We affirmed. *National Org. for Women v. Scheidler,* 968 F2d 612, 614 (7th Cir. 1992). The Supreme Court granted in part plaintiffs' petition for writ of certiorari to consider whether RICO sections 1962(c) and (d) require proof that either a racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. *National Org. for Women v. Scheidler,* 113 S. Ct. 2958 (1993). The plaintiffs also petitioned for review of our decision that their complaint failed to allege any violation of the Sherman Act. The Court denied plaintiffs' petition for writ of certiorari on the Sherman Act issue. *Id.*

The Supreme Court reversed our decision as to RICO sections 1962(c) and (d). The Supreme Court held that sections 1962(c) and (d) do not contain an economic motive requirement. *National Org. for Women v. Schiedler,* 114 S. Ct. 798, 801, 806 (1994). The Court's opinion was limited only to two of the RICO claims. The Court concluded that the plaintiffs "may maintain this action if [defendants] conducted the enterprise through a pattern of racketeering activity. The questions of whether the [defendants] committed the requisite predcate acts, and whether the commission of these acts fell into a pattern, are not before us." *Id.* at 806. The Supreme Court remanded the case to this court for further proceedings in conformity with its opinion.

As we have said, there are two RICO sections at issue in this case—sections 1962(c) and (d). Section 1962 (c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of *racketeering activity* or collection of unlawful debt.

18 U.S.C. § 1962(c) (emphasis added). Section 1962 (d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

18 U.S.C. § 1962(d). RICO defines "racketeering activity" to include "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 (relating to interference with commerce, robbery, or extortion)." U.S.C. § 1961(1)(B).

In this case, the plaintiffs' complaint alleges violations of section 1951—the Hobbs Act—as the "racketeering ac-

tivity" or prdicate acts that give rise to a pattern of racketeering activity by the defendants. Specifically, the plaintiffs allege Hobbs Act extortion—including attempts to commit extortion and conspiracy to commit extortion—as the defendants' predicate acts for purposes of RICO.

Defendants contend that the plaintiffs' complaint does not allege that their actions violated the Hobbs Act. The Supreme Court expressly declined to reach the issue and expressed no opinion upon it. *Scheidler,* 114 S. Ct. at 801 n.2. We direct the district court on remand to address this issue.

As to plaintiffs' complaint, we reaffirm our original dismissal of plaintiffs' complaint as to count 1 (Sherman Act) and count 2 (RICO § 1962(a)). The Supreme Court's decision reinstates count 3 (RICO § 1962(c)) and count 4 (RICO § 1962(d)). Counts five, six, and seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367.

Also on remand, if necessary, the district court should consider which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution. *See Scheidler,* 114 S. Ct. at 806 n.6. As Justice Souter pointed out in his concurring opinion, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.* at 807 (Souter, J., concurring). This includes Hobbs Act extortion—the sole RICO predicate act alleged by plaintiffs in both their complaint and their RICO Case Statement.

We remand this case to the district court for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT—WITHOUT ORAL ARGUMENT

Date: May 16, 1994

Before

HONORABLE WALTER J. CUMMINGS, Circuit Judge
HONORABLE WILLIAM J. BAUER, Circuit Judge
HONORABLE BRUCE M. VAN SICKLE, District Judge *

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,
Plaintiffs-Appellants

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, *et al.*,
Defendants-Appellees

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* The Honorable Bruce M. Van Sickle, District Judge of the United States District Court for the District of North Dakota, is sitting by designation.

Appeal from the United States District Court
Northern District of Illinois, Eastern Division
No. 86 C 7888, James F. Holderman, Judge

ON REMAND FROM THE
UNITED STATES SUPREME COURT

This cause came before the Court on remand from the United States Supreme Court.

This cause is REMANDED to the District Court for further proceedings, in accordance with the decision of this Court entered on this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 12, 1994

Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. WALTER J. BAUER, Circuit Judge
HON. BRUCE M. VAN SICKLE, District Judge *

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 86 C 7888—James F. Holderman, *Judge*

ORDER

On consideration of the petition for rehearing filed by defendant-appellee Vital-Med Laboratories, Inc., all of the

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* The Honorable Bruce A. Van Sickle, United States District Judge for the District of North Dakota, is sitting by designation.

judges on the original panel have voted to deny. On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendants-appellees Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, The Pro-Life Action League, Inc., Randall A. Terry, Project Life, Operation Rescue, and Monica Migliorino Miller, all of the judges on the original panel have voted to deny and no judge in active service requested a vote thereon **.

Therefore, the petition for rehearing and the petition for rehearing with suggestion for rehearing en banc are DENIED.

** The Honorable Kenneth A. Ripple took no part in consideration or decision of the suggestion for rehearing en banc.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,

Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7888—James F. Holderman, *Judge*.

ARGUED FEBRUARY 19, 1992—DECIDED JUNE 29, 1992

Before BAUER, *Chief Judge,* CUMMINGS, *Circuit Judge,* and VAN SICKLE, *Senior District Judge.*[1]

BAUER, *Chief Judge.* The plaintiffs, the National Organization for Women, Inc. ("NOW"), the Delaware Women's Health Organization, Inc. ("DWHO"), and Summit Women's Health Organization, Inc. ("SWHO"), brought this action seeking federal relief from the defendants' nationwide campaign to close medical clinics that provide abortion services. The second amended complaint[2] alleges violations of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(a), (c), and (d) ("RICO"). The complaint also raises several pendent state claims. The district court granted the defendants' motion to dismiss the complaint under F.R.C.P. 12(b)(6). *National Organization for Women v. Scheidler,* 765 F. Supp. 937, 945 (N.D. Ill. 1991).

The plaintiffs appealed. We reluctantly affirm the dismissal of the plaintiffs' claims for two reasons. First, we find that the antitrust laws were not intended to apply to the defendants' activities. Second, we hold that RICO requires either an economically motivated enterprise or economically motivated predicate acts.

I. Factual Background

The plaintiffs (a national non-profit organization aimed at advancing and protecting women's rights, and two women's health centers[3]), claim that the defendants, anti-

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[1] The Honorable Bruce M. Van Sickle, Senior Judge of the United States District Court for the District of North Dakota, is sitting by designation.

[2] For purposes of simplicity, we shall refer to the second amended complaint (Record Document 236) in text as "the complaint."

[3] NOW sought class certification for itself, its women members who use or may use the targeted health centers, and other women

abortion activists, anti-abortion groups, and a medical testing laboratory, engaged in a conspiracy to close all women's health centers providing abortions through a pattern of illegal activity. The complaint alleged that the defendants (other than Vital-Med Laboratories) engaged in the following illegal [4] activities in order to close women's health centers that perform abortions: extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel, and medical laboratories.[5] Many of these activities were organized by a coalition of anti-abortion groups called the Pro-Life Action Network ("PLAN"). The defendants who have participated in PLAN activities, the "PLAN defendants" are Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino,

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who use or may use the services of such centers. The health-center plaintiffs sued on behalf of themselves and all other similarly-situated centers performing abortions. The district court did not certify either class, apparently deferring its ruling until resolution of the motions to dismiss. *See* Minute Order of 1/08/88. All pending motions were dismissed as moot when the court granted defendants' motion to dismiss. *See National Organization for Women v. Scheidler*, 765 F. Supp. 937, 945 (N.D. Ill. 1991).

[4] When we use the terms illegal and unlawful to describe the defendants' activities, we refer not to violations of RICO or the antitrust laws, but to acts that are otherwise unlawful, such as trespass and vandalism.

[5] The district court also found that the defendants, in particular Scheidler, have links with arsonists who have fire-bombed health centers. The court also found that the defendants have not condemned fire-bombing. The court made these findings after defendant Wojnar moved for Rule 11 sanctions based upon the plaintiffs' allegation of the association in a pleading. *See Denial of Defendant Wojnar's First Motion for Sanctions*, March 27, 1992.

Pro-Life Action League ("PLAL"), Pro-Life Direct Action League ("PDAL"), Operation Rescue ("OR"), and Project Life.

More specifically, the complaint alleges that defendant Scheidler distributes Closed: *99 Ways to Stop Abortion,* a manual which advocates unlawful methods of interfering with the operations of women's health centers. Employing the methods detailed in the manual, defendants Scheidler, Ryan, Terry, Scholberg, Murphy, and Migliorino have spearheaded actions throughout the country aimed at closing health centers. For example, in March 1986, Scheidler, Ryan, PLAL, and PDAL, led others (alleged to be their co-conspirators) in an invasion of a health center in Florida. Protestors entered the center, and injured the center's administrator and another woman, the medical procedures room was ransacked, and medical supplies were destroyed. The participants who stormed the center were convicted on criminal charges.

Other demonstrations organized by defendants involved hundreds of individuals who blockaded clinics. During these "blitzes," as they are called, defendants' groups, using a method called "lock and block," pour glue into clinic locks, and individual protestors lock themselves to clinic doors. Another tactic involves abrasive confrontations with women seeking abortions, designed, according to a news release prepared by defendants, to take away the centers' business. The complaint details many other invasions of clinics, and in one case, a judge's home, involving injuries, trespass, and vandalism. Often these demonstrations resulted in the arrests of hundreds of demonstrators, including defendants, for state criminal law violations. For example, defendant Ryan has been arrested more than three hundred times; defendant Scheidler has been convicted and fined for criminal trespass and harassment. We note that the complaint does not purport to catalog all of the defendants' arrests and criminal convictions.

The plaintiffs also allege that two of the defendants (Wojnar and Terry) have established competing pregnancy testing and counseling facilities.

Defendant Vital-Med Laboratories, an Illinois corporation, provided pathology testing and safe, sanitary disposal services to DWHO, SWHO, and other affiliated clinics. Plaintiffs allege that Vital-Med participated in a conspiracy to steal fetal remains from Vital-Med's Northbrook, Illinois laboratory. In January 1988, defendant Wojnar was contacted by a Vital-Med employee who detailed a scheme for stealing fetal remains from the laboratory. Over a ten-month period, in conspiracy with one or more Vital-Med employees, defendants Murphy and Migliorino stole approximately 4,000 aborted fetuses from the laboratory. Murphy and Migliorino each entered Vital-Med's Northbrook laboratory, opened sealed storage drums containing a variety of medical waste, and removed fetal specimens. On at least one occasion, an entire storage drum was stolen. Vital-Med employees, who saw Murphy and Migliorino on at least one occasion, did nothing to stop the thefts.

The remains were stored at the homes of Scheidler, Murphy, Migliorino, and Wojnar. Scheidler kept the storage drum in a playhouse in his backyard for several weeks. After the fetal remains were removed, Murphy dumped the drum containing the remaining medical waste in a dumpster in Chicago. Remains were sent to anti-abortion activists in Indiana, North Carolina, North Dakota, Delaware, and Florida. Activists eventually held mass burial services for the fetuses in several states. Scheidler announced to news media that the fetuses had been found at a Chicago laboratory and that they were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places the abortions were performed." Second Amended Complaint, R. 236 at 24. Vital-Med no longer accepts fetal remains for testing.

Finally, defendants contacted businesses that provide goods and services to health centers and threatened to

disrupt and harass them if they continued to transact business with the centers. When SWHO arranged a move to new premises, defendant Migliorino threatened SWHO's future landlord and co-tenants. The landlord terminated the lease.

We note here that the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest, are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

Moreover, the complaint does not allege that the defendants have attempted to influence any governmental actor. There is no allegation that defendants petitioned a court, an administrative agency, an executive officer, or a legislature. Therefore, the district court's conclusion that the defendants' primary objective was to influence legislation is in error. Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior. *See NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 916 (1981).

II. Standard of Review

We review a 12(b)(6) dismissal *de novo, Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990); *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984). An action may only be dismissed if the complaining party "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). We assume all well-pleaded allegations are true and draw all reasonable inferences in the light most favorable to the plaintiff. *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842, 1845 (1991); *Bethlehem Steel*, 918 F.2d at 1326.

III. Antitrust Claims

The Supreme Court has cautioned that summary procedures should be used sparingly in antitrust cases because of the complexities involved. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Nevertheless, we have noted that "despite its sweeping language, *Poller* and its progeny simply stand for the proposition that, if a claim under the antitrust laws has been adequately set forth in the complaint, the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (citing *Havoco of America, Inc. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980), *cert. denied*, 470 U.S. 1054 (1985)). We also note that the treatment of this case has not been precipitous. It was filed on October 17, 1986. After discovery and two amendments to the complaint, the district court dismissed the action May 28, 1991.

Although Congress "left no area of its constitutional power [over commerce] unoccupied," when it passed the Sherman Act, it did not intend to outlaw every contract, combination, or conspiracy that restrains trade. *Summit*, 111 S. Ct. at 1846 n.10 (quoting *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945)). Otherwise every commercial business contract would fall within its prohibition. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59-69 (1911) (despite broad wording, not every form of combination or conspiracy that restrains trade falls within Sherman Act); *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 653 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978). *But see Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1974) (language of § 1 "contains no exception. . . . [O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions.").

We generally are reluctant to delve into questions of legislative intent when applying statutes. *See West Virginia University Hospitals v. Casey,* 111 S. Ct. 1138, 1147-48 (1991). The Supreme Court, however, has expressly sanctioned inquiry into the legislative history of the antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1976) (examining legislative purpose and history of Clayton Act); *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 489 (1939) (interpreting Sherman Act in light of legislative history and "particular evils at which the legislation was aimed.").

The Court explained in *Apex Hosiery,* 310 U.S. at 493 n.15, that "[t]he history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on such competition." For this reason, we question the appropriateness of the Act's application in this case.

We believe the Eighth Circuit's analysis of the legislative history of the Sherman Act in *State of Missouri v. National Organization for Women,* 620 F.2d 1301 (8th Cir.), *cert. denied,* 449 U.S. 842 (1980) ("*Missouri v. NOW*"), is particularly helpful. In *Missouri v. NOW*, the National Organization for Women helped organize a convention boycott of all states that had failed to ratify the Equal Rights Amendment. The explicit purpose of the boycott was to put economic pressure on states to ratify the ERA. Missouri sued, arguing that the boycott constituted a restraint of trade in violation of the Sherman Act.[6]

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[6] We note that the boycott in *Missouri v. NOW* is readily distinguishable from the defendants' actions in this case. The boycott was a peaceful, otherwise lawful attempt to influence legislation. In this case defendants' conduct (trespass, extortion, vandalism, and theft) violates state criminal laws. "The First Amendment does not protect violence. 'Certainly violence has no sanctuary in the

The *Missouri v. NOW* court noted that the legislative debates preceding passage of the Sherman Act indicate that the Act was not intended to reach the activities of organizations espousing social causes. Specifically, the debates indicated a desire to avoid regulating organizations aimed at discouraging the consumption of alcohol. *See id.* at 1307-08. Indeed, during the debates over the Sherman Act, senators expressed concern about the breadth of the bill, and Senator Sherman sought to allay these fears:

> George: [7] But yet that is the legal meaning and force of the bill; and I will state to the Senate and to the Senator from Ohio [Sherman] that it is directly within the terms of this bill to forbid any number of persons belonging to or joining a temperance society whose object is to compel retailers of intoxicating liquors to give up their business.
>
> Sherman: Where men agree that they will not drink at all, does the Senator think that is a combination in restraint of the trade of liquor-sellers?
>
> George: What is it?
>
> Sherman: The Senator, as I understand, now claims that an agreement among several people not to drink whisky or brandy is in restraint of the trade of selling whisky or brandy and is therefore a combination within the meaning of this bill?
>
> George: I insist that a society, making an agreement or a combination between citizens of a town

---

First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.'" *NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 916 (1981) (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1970) (Douglas, J., concurring)). Moreover, the avowed purpose of the defendants' activities is to close centers, not influence government actors.

[7] Senator James Z. George (D. Miss.). *See* 1 Earl W. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 15 (1978).

> anywhere in the Union not to drink, not to use in any way vinous or spirituous liquors, and to persuade others to a similar abstention, does, in the language of this bill, tend to compel persons engaged in retailing liquor in that community to give up their business, and the doing of that is expressly condemned by the third section of this bill.
>
> Stewart: [8] If an organization for the purpose of having laws passed creating high license is formed, would not that enhance the value of the things prohibited in this bill?
>
> George: I have considered that question. I have thought possibly that the courts might say that the right of a political organization to bring about political results by legislation was not embraced within the provisions of the bill.

1 Kintner, at 77-79 (quoting 20 Cong. Rec. 1458-59 (February 4, 1889)).

The 50th Congress did not pass an antitrust law; nevertheless, as Kintner has noted "these proceedings shed light on Congress's motivation and its assessment of the economic, political, and legal forces which were operating in the country." I Kintner, at 15. The 51st Congress passed the antitrust bill in a relatively short time, and debated it for only seven days. *Id.* at 17. During these debates the Senate again discussed the interaction between the Sherman Act and the temperance movement:

> Wilson: [9] I desire to offer an amendment to come in at the end of section 1 of the bill, and as an addition to the proviso contained in that section.
>
> The Presiding Officer. The Secretary will state the amendment proposed by the Senator from Iowa.

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[8] William M. Stewart (R. Nevada). *Id.* at 79.

[9] James F. Wilson (R. Iowa). *Id.* at 20.

The Chief Clerk. It is proposed to add at the end of the second proviso to section 1:

> Nor to any arrangements, agreements, associations, or combinations among persons for the enforcement and execution of the laws of any State enacted in pursuance of its police powers; nor shall this act be held to control or abridge such powers of States.

* * *

Hoar: [10] Allow me to ask the Senator if his amendment accomplishes his object. I understand his object is to protect combinations of persons intended to discourage the use and manufacture of intoxicating liquors.

Wilson: My object is to exclude them from the operation of the bill.

Hoar: I understand, to protect them from being affected by it. But the only description in his amendment is of such associations as are in aid of the execution of the laws of a State in pursuance of its police power. Now, if this bill without his amendment would render the class of persons subject to the penal provision, all temperance societies whose object is to persuade mankind not to use intoxicating liquors would still remain in spite of his amendment within the purview of bill. *It seems to me he should extend his amendment a little further, because, as far as my State goes, this class of associations which he has described do not confine their efforts to the execution of the law, but their efforts are a great deal more extensive and extend to discouraging the use or manufacture of intoxicating liquors altogether.* This is what he means, and we should all vote for it.

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[10] George F. Hoar (R. Massachusetts). *Id.* at 14.

Wilson: I am satisfied that my amendment will cover the purpose I have in view concerning my State. If other Senators desire something further in regard to their state, they can move it.

Hoar: I move to amend the Senator's amendment by adding to it:

> Or to discourage the use or manufacture of intoxicating liquors.
>
> And we will take a vote on that.

The Presiding Officer. The question is on agreeing to the amendment to the amendment.

Sherman: The Senator from Iowa showed me his amendment. As these organizations in Iowa are associated and organized something in the nature of a corporation, there might be some reason for believing that they possibly might fall within the clauses of the bill. Therefore, I have no objection to his amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination arrangement made to interfere with interstate commerce; but under the peculiar circumstances, upon the facts stated by the Senator from Iowa, I think it is very proper to make an exception of those organizations in Iowa which are really in aid of the execution of State law. I would apply it to all organizations which are using either moral or any other kind of means for the enforcement of local laws; but I do not think it is worth while to adopt the amendment of the Senator from Massachusetts, because that would include temperance societies. You might as well include churches and Sunday schools.

Id. at 250-52 (quoting 21 Cong. Rec. 2658-59 (1890)) (emphasis added).

Protests against establishments *legally* serving liquor were sometimes violent. *See* Jack S. Blocker, Jr., Give to the Winds Thy Fears: The Women's Temperance Crusade, 1873-1874, 50, 76-77, 197 (1985) (describing violence by protesters and against them). *See also* Joseph Gusfield, Symbolic Crusade: Status Politics & the American Temperance Movement (2d ed. 1986); Mother Stewart, Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1873, Against the Liquor Crime (1972). Temperance "crusaders" as they were sometimes called, "physically attacked saloons, sometimes with hatchets, hammers, and other tools, destroying the stock of liquor and perhaps the furnishings as well." Blocker, at 50.

Other crusaders contented themselves with "peaceful" invasions, wherein they would descend *en masse* to pray and plead with druggists and saloon keepers to stop selling liquor. They also "stationed one or two women at each dealer's door, to plead with or simply embarrass those seeking to enter." *Id.* at 48. Often large numbers of crusaders would march on recalcitrant liquor sellers. A violent scuffle ensued when 100 crusaders descended upon a tavern in Columbus, Ohio. *Id.* at 197. Thirty entered the tavern and refused to leave, and the owner called the police. Before police arrived, one of the women crusaders fought with the proprietor and his wife. Although they left the premises when asked by the police, crusaders continued to picket the establishment. *Id.* To provide potential drinkers with a social alternative to the saloon, crusaders set up reading rooms and coffee houses. They offered such establishments in at least twenty locations in six states. *Id.* at 50. The violence surrounding the temperance movement was well-publicized, and legislators were undoubtedly aware of the crusaders' activities. *See, e.g.*, Mother Stewart, Memories of the Crusade, 98-101 (1972) (discussing press coverage of crusaders' activities).

Commentators have pointed out the parallels between the modern-day anti-abortion protests and the temperance movement. "One is drawn to recall slavery and prohibition as the historical analogues to this controversy." Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion,* 25 Ga. L. Rev. 923, 926 (1991). Indeed, the parallels are striking. Defendants here have entered clinics violently, assaulted personnel, and destroyed medical supplies. They lead large groups of protesters to health centers to persuade center staff to stop performing abortions. They confront patients and plead with them not to enter the centers. Wojnar and Terry have established "pro-life" pregnancy counseling centers, which like the temperance crusaders' coffee houses, purport to provide an alternative for the centers' services.

While the language of the congressional debates is not unequivocal, like the court in *Missouri v. NOW,* we believe it provides a fair indication that Congress did not intend to reach every activity that might effect business. As the Senator from Massachusetts remarked, even temperance organizations that went beyond the execution of state laws in discouraging people from consuming liquor were not to be covered by the Act. Sherman's comments mitigate this conclusion somewhat, because he discusses only those organizations attempting to bolster the execution of state laws.

Some of these comments foreshadow the development of the *Noerr-Pennington* doctrine, which protects businesses' and other associations' efforts to obtain a governmental imposition of a trade restraint. *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *Lawline v. American Bar Association,* 956 F.2d 1378 (7th Cir. 1992). But, as we pointed out in our discussion of the background facts, the plaintiffs do not complain about petitioning. "The

doctrine does not . . . protect purely private action not genuinely aimed at prompting governmental action." *Wilk v. American Medical Association,* 895 F.2d 352, 357 (7th Cir. 1990). *Cf. Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan,* 518 F. Supp. 993 (1981) (*Noerr* does not protect attempt to eliminate a class of competitors—other fishermen—using violence, threats, vandalism).

Other cases successfully invoking the doctrine's protection have alleged in the complaint the petitioning activity. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1971) (state and federal administrative proceedings to bar plaintiffs' entry into trucking market); *Pennington,* 381 U.S. at 657 (influencing Secretary of Labor to enact labor standards); *Noerr,* 365 U.S. at 127 (false publicity campaign to convince legislators and governor to enact legislation harmful to competitors); *Lawline v. American Bar Association,* 956 F.2d 1378 (7th Cir. 1992) (lobbying state to adopt ethical rules). Because the defendants' acts are far removed from the direct petitioning protected in these cases, we do not believe they are protected by the *Noerr-Pennington* doctrine. In fact, the defendants' audacity in asserting that violence, criminal trespass, and vandalism are protected by the First Amendment, rivals Carry Nation's—after inciting a riot by smashing up a saloon with an axe, she declared, "There is a spirit of anarchy abroad in this town!" Robert Lewis Taylor, Vessel of Wrath: The Life and Times of Carry Nation, 201 (1966).[11]

We are convinced by the economic and legislative history of the Sherman Act that it was intended to prevent business competitors from making restraining arrange-

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[11] We also note Professor Fischel's point that "conduct unprotected by *Noerr* does not necessarily constitute an antitrust violation." Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis & Limits of the Noerr-Pennington Doctrine,* 45 U. Chi. L. Rev. 80, 82 (1977).

ments for their own economic advantage. As the Court stated in *Allen Bradley Co. v. Union*, 325 U.S. 797, 811 (1945), "We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies." [12] Defendants are not involved in business, and have no ability to concentrate economic power. This, together with the striking parallels between their activities and those of the temperance crusaders, which Congress, it would seem, intended to exclude from the operation of the Act, forces us to conclude that the defendants' activities are not prohibited by the Sherman Act.

We are not the first court to conclude that certain agreements are not within the scope of the antitrust laws. In *Missouri v. NOW*, 620 F.2d at 1301, the Eighth Circuit concluded that Congress probably did not intend to include political boycotts by non-competitors. The court in *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 653 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), concluded that when restrictions on college accreditation have no commercial motive, "the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act." *Id.* at 655 (footnotes omitted). *See also Council for Employment & Economic Energy Use*, 580 F.2d 9, 12 (1st Cir. 1978) (Complaint alleging radio stations that agreed on amount of free air time for plaintiff's political opponent violated antitrust laws dismissed on 12(b)(6): "This case involves political opponents not commercial competitors; and political objectives not market place goals."), *cert. denied*, 440 U.S. 945 (1979).

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[12] *Allen Bradley* involved an illegal combination of a labor union, contractors, and manufacturers.

We observe, as we did in *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980), that "it is hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction." We believe it is unfortunate that the plaintiffs lack an effective remedy for the defendants' reprehensible conduct, but we find no antitrust violation here. *But see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991) (discussing besieged abortion clinic's claim under 42 U.S.C. § 1985 (3)). Non-commercial purpose alone will not shield activity from antitrust scrutiny, *see Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981) (dispute between lay and clerical members of Roman Catholic Church), but the defendants' acts are far beyond those that Congress intended to reach with the Sherman Act.

At bottom, the basic question presented by the plaintiffs' complaint is whether the antitrust laws protect an industry faced with violent opposition from some segment of the public. For example, could nuclear power providers or logging companies bring antitrust claims against the Earth First! organization for vandalism and trespass? *See, e.g.*, Glenn Bohn Vansun, *Walbran Activist Deny Link to Radical Environmental Group*, Vancouver Sun, Sept. 21, 1991, at A1 (describing sabotage of nuclear plant's electrical lines, tree spiking, and logging equipment damage). We do not believe these kinds of actions are within the scope of the antitrust laws. The defendants' actions are directed against *all* centers providing abortions.

The Court's analysis in *Apex Hosiery*, another case involving violent, "reprehensive" conduct by defendants which fell outside the scope of the Sherman Act, bolsters our conclusion that the plaintiffs' complaint was properly dismissed. 310 U.S. at 484. In *Apex Hosiery*, union members from nearby factories took over the plaintiff's plant and remained in possession for more than a month. *Id.* at 482. The invaders changed the locks, wilfully

wrecked machinery, and damaged property and equipment. Operations at the plant could not resume for two months after the plaintiff regained possession. *Id.* The union acted to force the plaintiff to hire only union employees. *Id.* at 482.

The Court explained that although the union members violated the civil and penal laws of Pennsylvania, if no antitrust violation occurred, the violence and state-law violations did not confer federal jurisdiction. *Id.* at 483-84. The Court rejected the union's contention that all labor activities are exempt from Sherman Act, *id.* at 487, just as we reject defendants' contention that all "protest" or non-commercially oriented activities are exempt because of the First Amendment.

The Court analyzed the defendants' conduct, and determined that

> the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.' And in speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is 'indirect' [we] mean no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences [sic] of the conspiracy.

Apex Hosiery, 310 U.S. at 511 (quoting *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 471 (1921)). The Court emphasized that the cases interpreting the Sherman Act recognized that "[t]he Sherman Act was not enacted . . . to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its

price, or discriminate between its would-be purchasers." *Id.* at 512. Finally, the Court emphasized that "[r]estraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." *Id.* at 513.

We find this reasoning applicable here. The plaintiffs have not alleged that the defendants are exercising market power to harm their businesses. Rather, the plaintiffs seek federal protection from the defendants' campaign of otherwise-criminal activities which are directed at destroying all health centers performing abortions. Plaintiffs have failed to make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs [13]), or discrimination between would-be purchasers.

The myriad cases upon which plaintiffs rely offer little help. We have found only one case where non-competitor defendants tried to destroy a plaintiff's business. *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920). In that case, the Counsel of Defense, a group of New Mexico residents, organized a boycott of the Hearst newspapers and magazines to protest what they perceived as Hearst's pro-German sympathies.

The court found the conspiracy to boycott and blacklist the publications was prohibited by the Sherman Act. We believe, however, that this case is no longer good law. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981), the Court held that a sometimes-violent boycott

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[13] This is not to say that cartels or would-be monopolists who try to injure competitors by raising costs are not subject to the antitrust laws. *See, e.g., Premier Electric Construction Co. v. National Electrical Contractors Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (discussing anticompetitive effects, and thus illegality, of raising rivals' costs). *See also* 3 Milton Handler, Antitrust in Transition 1178-79 (1991).

organized by black people against white merchants was beyond the reach of economic regulation. *Id.* at 913. The boycott was designed to force civic and business leaders to comply with a list of demands for racial equality and integration. The Court, relying in part upon *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. at 127 (1961), held that the non-violent aspects of political boycotts are protected by the First Amendment. *Id.* at 915. *Claiborne* calls into question the holding in *Council of Defense*. We conclude that *Council of Defense* is not controlling here.

Because we find that Congress did not intend to include defendants' activities within the scope of the Sherman Act, we affirm the district court's dismissal of the plaintiffs' antitrust claims.

IV. RICO

The Plaintiffs have also claimed that defendants Scheidler, Terry, Scholberg, Murphy, PLAL, Operation Rescue, and Project Life have violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(a), (c),(d).

A. § *1962(a)*

The plaintiffs alleged in count two of the complaint that PLAN, PLAL, and Operation Rescue violated § 1962(a)[14] because the donations they receive from supporters are derived from their racketeering activity. The racketeering activity is extortion under the Hobbs Act, 18 U.S.C.

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[14] 18 U.S.C. § 1962(a) provides in relevant part:

It shall be unlawful for any person who received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate commerce.

§ 1951, directed at health centers, center employees, and patients. Plaintiffs asserted that "[i]t is well-known that the more outrageous and highly publicized the activities are, the more likely the RICO Defendants and the enterprices are to receive larger donations." RICO Case Statement, R. 469, at 22.

The district court dismissed the plaintiffs' claims under § 1962(a) because it found that the income defendants receive through donations was not "derived directly or indirectly, from a pattern of racketeering activity." 765 F. Supp. at 941. Because contributors were not extorted, the court held that the contributions were not derived from racketeering activities.

In reaching its holding, the district court relied heavily upon *Hemmings v. Barian*, 822 F.2d 688 (7th Cir. 1987). In *Hemmings*, the defendant agreed to purchase the plaintiff's company for a cash downpayment, plus five subsequent cash payments and other consideration. *Id.* at 692. The plaintiff alleged that the defendant never intended to make the subsequent payments, and instead used the money to buy a second corporation. The plaintiff argued that the defendant violated § 1962(a) because the money saved by failing to make payments was "derived from a pattern of racketeering activity." *Id.*

We refused to accept this argument—we found that although the defendant may have used income he owed plaintiff to fund his second business, there was no suggestion that *that* income came from fraud. *Id.* The source of the misapplied income was "proper and aboveboard. The fraud was in promising to pay Hemmings the balance of the agreed purchase price . . ., when Barian had no intention of ever paying it." *Id.* Because the money was lawful income, not extracted from the plaintiff (or anyone else) by fraud, we refused to find a RICO violation.

Plaintiffs argue that *Hemmings* does not support the district court's holding because "in *Hemmings*, the defendant did not 'derive' the money from anything illegal—

he already had it. Here, the defendants had the money only after their well-publicized, unlawful acts prompted their supporters to send them the money . . . ." Appellants' Brief at 48. This argument is unpersuasive. The plaintiffs argue based upon their reading of *Azurite Corp. v. Amster & Co.*, 730 F. Supp. 571, 578 (S.D.N.Y. 1990), that the *Hemmings* claim was dismissed because the plaintiff failed to plead a causal connection between the fraud and the income invested. Based on this reading, plaintiffs argue that *Hemmings* does not dictate the dismissal of their claim under § 1962(a) because they pleaded a connection.[15]

Plaintiffs attempt to bolster this argument with references to *United States v. Vogt*, 910 F.2d 1184, 1194 (4th Cir.), *cert. denied*, 111 S. Ct. 759 (1991), and *United States v. McNary*, 620 F.2d 621, 628 (7th Cir. 1980). These cases are unavailing. In *Vogt*, the defendant, a customs officer, laundered bribe money through a group of dummy corporations that deposited money off-shore, brought it back into the United States, and then invested it. Vogt argued that the government failed to prove he invested the bribe money in the laundering enterprises. The court stated that "[s]ection 1962(a) does not exact rigorous proof of the exact course of income derived from a pattern of racketeering activity into its 'ultimate use or investment.' " *Id.* at 1194.

Plaintiffs point to this language in support of their contention that they adequately have alleged that the donations defendants receive are "derived" from their racketeering acts. This argument is specious—the Fourth Circuit was dismissing the argument that the government in its proof, must trace illegally received money "from its receipt to its ultimately proscribed 'use or investment' by the defendant." *Id.* In other words, plaintiffs in this case

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[15] *Azurite* held that defendants who were able to purchase stock at artificially low prices because of their fraudulent SEC filings derived income from the fraud within the meaning of § 1962(a).

are not required to show the specific flow of contributions from the time the defendants receive them until they ultimately spend them. There was no question that Vogt derived income from racketeering—he took bribes.

McNary is analogous. McNary, as Mayor of Lansing, Illinois, was convicted of bribery and extortion. The issue on appeal was whether the government proved that McNary invested the $85,000 in bribery receipts in his family-owned travel company. We noted that the statute does not require "immediate or even direct use of illicit income to establish a violation of its terms. . . . To require . . . that the evidence show a direct employment of illicit income is to ignore the clear proscription of the statute . . . ." *McNary*, 620 F.2d at 628. Plaintiffs again misapprehend this language. *See* Appellants' Brief at 49. In *McNary* we held that interim deposits, commingled funds, and other accounting techniques do not bar liability. Section 1962(a) does not require the government to trace the course of each penny of illicit income through the defendant's hands. *McNary*, 620 F.2d at 629.

Thus the cases the plaintiffs cite are inapposite to their claim—at issue here is whether the defendants' contributions were derived from their extortionate acts. We agree with the district court that they were not. Plaintiffs concede that the contributions are only "indirect" income from the extortionate acts, but they argue this is sufficient under § 1962(a). That section does sanction the use of funds "derived, directly or indirectly, from a pattern of racketeering activity." The attenuated causal connection between the defendants' criminal trespass, threats, and vandalism, and their receipt of donations from third parties, however, is not sufficient.

The Supreme Court has noted that notions of proximate cause are properly applied to RICO. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992). In *Holmes*, the Court held that an insurance company could not recover under § 1962 based upon the defend-

ants' fraud on its insured and its insured's customers. *Id.* Proximate cause generally is associated with the determination in civil tort litigation as to whether the plaintiff's injury was direct enough to permit him to recover from the defendant. *Id.* at 1318. Nevertheless, we believe this judicial tool for examining the directness of a relationship is helpful in this context. "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " *Id.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Own, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984)). The cause and effect chain plaintiffs posit is something like this: defendants invade health centers, destroying property and injuring center staff; media covers event; potential contributors see media coverage and are favorably impressed; contributor sends donation; defendants receive income. Based in part upon notions of proximate cause, we believe this alleged relationship between the defendants' criminal acts and their supporters voluntary contributions is simply too tenuous to satisfy the requirements of § 1962(a).

We also find the cases interpreting the RICO forfeiture provisions of § 1963 support our conclusion. Section 1963(a)(1) requires that a defendant forfeit "any interest he has acquired or maintained in violation of § 1962 . . . ." In interpreting the term "interest" under this section, we have held that "the court must determine what portion of [the defendant's] interests would not have been acquired or maintained 'but for' his racketeering activities. *United States v. Horak*, 833 F.2d 1235, 1243 (7th Cir. 1987). *See also United States v. Ofchinick*, 883 F.2d 1172, 1183 (3d Cir. 1989) (applying *Horak*'s 'but for' test), *cert. denied sub nom., DeLucia v. United States*, 493 U.S. 1034 (1990); *United States v. Porcelli*, 865 F.2d 1352, 1365 (2d Cir. 1989) (same), *cert. denied*, 493 U.S. 810 (1989).

Following this reasoning, under § 1962(a), "income derived, directly or indirectly, from a pattern of racketeer-

ing activity" is only income that the defendants would not have received 'but for' their racketeering conduct. Here, plaintiffs have not alleged that contributors would not have donated money to the defendants but for the defendant's predicate racketeering acts. Therefore, the income is not derived from racketeering activity for purposes of § 1962(a).

B. § 1962(c)

In count three, plaintiffs allege that Pro-Life Action Network ("PLAN") operated as an enterprise in violation of § 1962(c). PLAN is a coalition of anti-abortion groups. The defendants who have participated in PLAN activities, the "PLAN defendants," are Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, Pro-Life Action League ("PLAL"), Pro-Life Direct Action League ("PDAL"), Operation Rescue ("OR"), and Project Life.

Section 1962(c) prohibits conduct of an enterprise through a pattern of racketeering activity.[16] *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) The district court dismissed the plaintiffs' § 1962(c) claims because it found that § 1962(c) requires that plaintiffs allege "some profit-generating purpose." *Scheidler*, 765 F. Supp. 937, at 943. The court read existing case law to require either the predicate acts of racketeering or the enterprise to have some financial motive. *Id.* at 942 (citing *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988), *cert. denied*, 488 U.S. 974 (1988)); *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985); *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983), *cert. denied*, 474 U.S. 1032 (1985); *United*

[16] § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

States v. Ivic, 700 F.2d at 65; *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The plaintiffs argue that only an economic effect on interstate commerce is required, which they have alleged.

Whether or not liability under RICO may be imposed when neither the enterprise nor the racketeering acts are economically motivated is a question of first impression in this circuit. The other circuits are split on the issue. *Compare United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) ("For purposes of RICO, an enterprise must be directed toward an economic goal."); *United States v. Ivic*, 700 F.2d 51, 59-65 (2d Cir. 1983) (same) *with Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1349-40 (3d Cir. 1989) (because predicate offense (Hobbs Act) does not require economic motive, RICO requires no additional economic motive), *cert. denied*, 493 U.S. 901 (1989); *Feminist Women's Health Center v. Roberts*, No. C86-1617, 1988 WL 156656, *11 n.2 (W.D. Wash., Mar. 11, 1988) (citing *McMonagle* and declining to follow *Ivic*). In his dissent from the denial of certiorari in *McMonagle*, Justice White noted the conflict.

Although we have never grappled with the economic motive issue head on, we have adopted the Eighth Circuit's definition of enterprise, which includes an economic goal requirement. *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) (quoting *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)), *cert. denied*, 479 U.S. 939 (1986). Other circuits have also adopted the *Anderson* formulation. *See United States v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988); *United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980).

Section 1961(1)(4) states that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals

associated in fact though not a legal entity." In this case, PLAN does not appear to have legal status as a corporation, partnership, or association recognized by state law. Rather, it is a group that organizes anti-abortion activities. Hence, it comes under the "group of individuals associated in fact though not a legal entity" portion of § 1961.

Anderson and *Neapolitan* provide the framework for determining whether an informal association is an enterprise. In *Anderson*, two court administrators were charged with defrauding their employers through a false purchase-order scheme. 626 F.2d at 1980. The indictment alleged that each defendant's association with the salesman who supplied the phony invoices constituted the enterprise. Now, of course, the government more routinely alleges that the entities that employ such defendants are the enterprise, i.e. the sheriff's office, (*United States v. Lee Stoller Enterprises*, 652 F.2d 1313 (7th Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981)), the state's attorney's office, (*United States v. Yonan*, 800 F.2d 164, (7th Cir.), *cert. denied*, 479 U.S. 1055 (1986)), etc. The *Anderson* court found that the enterprise must "signify an association that is substantially different from the acts which form the pattern of racketeering activity." *Anderson*, 626 F.2d at 1365. After a thorough analysis of the statutory language, the court held that the term enterprise

> encompass[es] only an association having an ascertainable structure which exists for the purpose of maintaining operations *directed toward an economic goal* that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity.

Id. at 1372 (emphasis added).

We adopted this holding in *Neapolitan*, where we too distinguished between the racketeering acts and the enterprise. 791 F.2d at 500. *Neapolitan* considered the enter-

prise in two RICO cases involving a stolen car ring. In one, police officers took bribes from car thieves, and were charged with conducting the sheriff's office (the enterprise) through a pattern of racketeering activity. In the other, the car thieves themselves operated a large scale "chop shop," which was allegedly the RICO enterprise.

As plaintiffs point out, economic motive was not an issue in either *Neapolitan* or *Anderson*. It was clear defendants were acting for financial gain. Another case adopting *Anderson, United Sttaes v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980), did place some emphasis on the profit motive. *Errico* involved a conspiracy to fix horse races. The court found that a circle of betters and jockeys, joined together through the defendant, satisfied the enterprise requirement because they regularly attempted to and did profit from the illegally fixed races. *Id.* at 156.

The lack of significant focus on motive weakens the authority of these cases somewhat on this particular issue, however, so we turn to the cases that have confronted it directly. The leading case, *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), involved a Croatian nationalist group that used "terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs." *Id.* at 58.

In a carefully reasoned opinion, the court in *Ivic* drew upon the language of the statute, its legislative history, Supreme Court precedent, and Justice Department Guidelines to determine that the enterprise or predicate acts must have an economic motive to violate RICO.

Reading 1962(c) together with sections (a) and (b), the *Ivic* court stated that the term enterprise in those sections referred to "an organized profit-seeking venture." *Id.* at 60. It noted there was no indication that Congress intended to have the same term mean something different

in section (c). Indeed, the Supreme Court has stated that "We should not lightly infer that Congress intended [terms] to have wholly different meanings in neighboring subsections." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1984). The court examined the legislative history of the Act, and explained that the terrorist actions were not part of the "evil corruption of our commerce and trade" which the Act was intended to remedy. *Ivic*, 700 F.2d at 63 (quoting 116 Cong. Rec. 35295, remarks of Representative Poff).

The *Ivic* court observed that although *United States v. Turkette*, 452 U.S. 576 (1981), held that the term enterprise encompasses illegitimate organizations, it did not suggest the term reaches every such organization. *Turkette* recognized that RICO was originally directed at the infiltration of organized crime into legitimate businesses with funds raised through loan sharking, illegal gambling, and other criminal activities. *Id.* (citing *Turkette*, 452 U.S. at 591 (1981)). The *Ivic* court found that political terrorist organizations do not generate funds that could allow them to infiltrate legitimate business. *Id.* This court has noted that although infiltration by organized crime was the major concern of Congress, those concerns extended much further. *Horoco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984) (citing *Turkette*, 452 U.S. at 590-91), *aff'd*, 473 U.S. 606 (1985). In fact the Supreme Court has noted that "although [RICO] had organized crime as its focus, [it] was not limited in application to organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248 (1989). Nevertheless, we believe congressional concerns may not have extended so far as the activities of political terrorists which involve neither economic crimes nor economic motivations.

The *Ivic* court also stated that the Justice Department's 1981 RICO Guidelines provided that a RICO indictment should not charge an association as an enterprise, unless

the association exists "for the purpose of maintaining operations directed toward an economic goal . . . ." *Id.* at 64. Based on these factors, the *Ivic* court held that an indictment that fails to charge that the enterprise or predicate acts had an economic motive does not state a crime under § 1962(c).

The Second Circuit returned to the issue in *United States v. Bagaric,* 706 F.2d 42 (2d Cir.), *cert. denied,* 464 U.S. 840 (1983). *Bagaric* also involved a Croatian terrorist group, but the defendants also "perpetrated an extensive international extortion scheme using the United States and foreign mails." *Id.* at 46. The group, in addition to bombing, arson and murder, established a scheme to extort money from moderate Croatians in the United States to support their activities. *Id.* at 48. The group compiled a list of "potential wealthy victims, and threatened to squeeze [them] financially . . ." *Id.* Extortion letters demanding $5,000 to $20,000 were posted from foreign countries directed victims to mail money to a post office box in Paraguay. Several individuals who resisted the extortion demands were killed. 706 F.2d at 50.

The court held that because some of the predicate acts were economically motivated, i.e. extorting money to finance terrorist activities, RICO's economic motivation requirement was satisfied. It pointed out that *Ivic* did not require that economic gain be the sole motive of every RICO violation. *Id.* at 53. *Ivic* only required that either the predicate acts or the enterprise be geared toward economic gain. Political motivations would not shield the "more than fifty acts of the classic economic crime of extortion . . . ," simply because the money would be used for political ends. *Id.* at 58. Thus *Bagaric* reaffirmed *Ivic*'s holding that the government (or a civil plaintiff) may show financial purpose through either the enterprise or the predicate racketeering acts. *Id.* at 56.

The Second Circuit revisited the issue again in *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985). *Ferguson* involved bank and armored-truck robberies, and murders performed to support the Black Liberation Army. The defendants challenged their indictment under RICO because they were "revolutionaries." *Id.* at 853. The court explained, however, that RICO requires only "some financial purpose." *Id.* The defendants were charged with ten robberies and attempted robberies, and the murders of police and guards committed during the course of the robberies. The money obtained from the crimes was used to support the "revolutionary" enterprise. Because the defendants' activities were centered around the commission of economic crimes, the court held that RICO was properly applied to the defendants. *Id.*

Shortly after *Ferguson* was decided, the Supreme Court rejected the Second Circuit's interpretation of § 1962(c), which barred civil actions unless the defendant had been convicted of criminal charges and the plaintiff could show "racketeering injury." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Plaintiffs in this case argue that *Sedima* prohibits any limitation on the scope of RICO. Appellants' Brief at 37. We disagree. This court, in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), rejected the racketeering injury requirement, and held that injuries caused by the predicate acts of racketeering satisfy RICO. *Id.* at 388. We noted with some concern the Second Circuit's attempts to limit RICO to organized crime activities, and rejected that limitation.

Although we have resisted attempts to limit the scope of civil RICO, *see, e.g., Morgan v. Bank of Waukegan*, 804 F.2d 970, 975-76 (7th Cir. 1986) (multiple schemes not required for pattern of racketeering activity); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.) (rejecting argument that RICO limited to organized crime), *cert. denied*, 464

U.S. 1002 (1983), we do not believe the limitation imposed by the *Ivic, Bagaric, Ferguson,* line of cases is unwarranted. We recognize that "[e]ven if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices on the part of Congress." *Haroco,* 747 F.2d at 398-99. But, as the Second Circuit discussed in *Ivic,* we believe the use of the term enterprise in §§ 1962(a) and (b) conveys a restriction to economic entities. *Ivic,* 700 F.2d at 61.

This court has also looked to the provisions of § 1962(a) to guide our interpretation of § 1962(c), albeit on a different point. *See Haroco,* 747 F.2d at 402 (interpreting interaction of roles of "enterprise" and "person"). The courts have extended the economic motivation limitation by allowing economically motivated predicate acts to bring conduct within the scope of RICO. Further expansion does not seem justified. "[W]e do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits." *Haroco,* 747 F.2d at 400.

Further, the Court in *Sedima* seemed particularly troubled by the vague, amorphous nature of the racketeering injury requirement. *Sedima,* 473 U.S. at 494-95. The economic motive requirement does not have this weakness. Moreover, the Court held that the statute requires only that the plaintiff allege each element of the violation, and that courts should not graft on additional elements. *Id.* at 497. In this case we do not believe we are adding elements to the offense, but merely fleshing out the definitions of those elements.

Further, despite its urging to avoid undue limitations of civil RICO, the Court has referred consistently to "businesses":

> Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. Legitimate businesses enjoy

> neither an inherent incapacity for criminal activity nor immunity from its consequences; and, as a result, § 1962(c)'s use against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.

Northwestern Bell, 492 U.S. at 229. This emphasis on business—economic activity—bolsters our conclusion that non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO. We also find support in the economic motive requirement discussed in *Anderson, Neapolitan,* and *Flynn, supra.*

We do not believe that requiring an economic motive will place undue limitations upon RICO actions. Nor do we believe our holding flies in the face of the Supreme Court's dictates in *Sedima* and *Northwestern Bell.* Indeed, we find that this interpretation of § 1962(c) is dictated by the terms of the statute. Thus, although we agree with the Third Circuit's interpretation of the Hobbs Act,[17] we decline to follow its holding that, in these circumstances involving a non-economic enterprise committing non-economic predicate acts, plaintiffs may invoke the provisions of RICO. *McMonagle,* 868 F.2d at 1349-50.

The plaintiffs argue that, even if there is an economic motive requirement, they have alleged that the defendants committed unlawful acts to raise funds. More specifically, that the defendants received contributions as a result of their extortionate acts and, that they sold materials detail-

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[17] The Hobbs Act, 18 U.S.C. § 1951, which punishes obstruction of interstate commerce through extortionate means, does not require that the defendant profit economically from the extortion. *See Town of West Hartford v. Operation Rescue,* 915 F.2d 92, 102 (2d Cir. 1990); *United States v. Anderson,* 716 F.2d 446 (7th Cir. 1983) (defendant kidnapped and threatened to kill physician unless he agreed to cease performing abortions violated Act); *United States v. Starks,* 515 F.2d 112 (3d Cir. 1975) ("solicitations" for religious purposes not exempt from Hobbs Act).

ing unlawful methods of closing health centers. The plaintiffs argue that it is reasonable to infer from these allegations that the defendants committed extortionate acts to raise funds. In addition, they contend that defendants' activities were economically motivated because they were aimed at increasing the plaintiffs' costs of doing business. Increasing their costs, plaintiffs argue, satisfies the economic purpose requirement. Finally, plaintiffs argue that they are entitled to prove that the defendants intended to generate financial gain by selling materials advocating criminal acts against the centers.

There are several problems with these contentions. First, it is not reasonable to infer that the purpose of the defendants' extortion is to raise funds. It is clear that the aim of the extortion is to close women's health centers, as plaintiffs have repeatedly alleged throughout their complaint. *See* Second Amended Complaint at 3, 10, 11, 13, 14, 18, etc. That reprehensible criminal and tortious conduct results incidentally in donations to support it, is more a comment on the nature of the defendants' supporters than on the purpose of the defendants' acts.

Second, none of the cases discussing an economic motive requirement adopt the plaintiffs' theory that raising the victim's costs satisfies the requirement. In fact, *Ivic* itself seems to contradict such an interpretation. In *Ivic,* victims' businesses were threatened with arson and bombing. Certainly this would increase their "costs," although the defendants' motive in that case was political coercion unrelated to the operation of the businesses. *Ivic,* 700 F.2d at 58. The plaintiffs' argument seems to be a vestige of the "raising rivals' costs" argument raised in their antitrust claim. We do not contest that the defendants' activities had an economic effect on the plaintiffs, we simply refuse to equate that effect with the economic motive required by *Ivic* and its progeny.

Finally, selling materials advocating a particular viewpoint, even if the materials advocate illegal actions, is not

a predicate racketeering activity. Therefore income derived from the sales is not income derived from racketeering activity. Moreover, unless the materials violate the "clear and present danger" test, their distribution is protected by the First Amendment. *Cf. Cantwell v. Connecticut,* 310 U.S. 296, 308 (1939):

> No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, . . . or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.

For these reasons, we find no merit in the plaintiffs' argument that they have satisfied the economic motive requirement of § 1962(c).

C. § *1962(d)*

Under count four, plaintiffs charge that PLAN, PLAL, and Operation Rescue conspired to violate sections 1962 (a) and (c), an offense punishable by § 1962(d). Because plaintiffs claims under sections 1962(a) and (c) fail, we find no violation of § 1962(d).

V.

In conclusion, despite the reprehensible nature of the defendants' activities, we find that they are not within the reach of the Sherman Act or RICO. Therefore, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: June 29, 1992

Before:

Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Bruce M. Van Sickle, Senior District Judge*

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INCORPORATED, on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,

Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, *et al.*,

Defendants-Appellees.

*** The Honorable Bruce M. Van Sickle, Senior District Judge of the United States District Court for the District of North Dakota, is sitting by designation.**

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 7888—James F. Holderman, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 7888

NATIONAL ORGANIZATION FOR WOMEN, INC., DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., *et al.*,
Plaintiffs,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,
Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge

Plaintiffs National Organization for Women ("NOW") and two women's health centers brought this action against various antiabortion activists, antiabortion organizations, and a pathology testing laboratory alleging that defendants conspired to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity in violation of the Sherman Antitrust Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and several pendent state claims.

In furtherance of the conspiracy, plaintiffs' second amended class action complaint alleges, *inter alia*, that

defendants threatened and intimidated clinic personnel and patients, trespassed on clinic property, invaded clinics and damaged clinic equipment, blocked ingress and egress to clinics, destroyed clinic advertising, coordinated telephone campaigns to tie up clinic lines, set up appointments under false pretenses to keep legitimate patients from making appointments, and established competing pregnancy testing and counseling facilities in the vicinities of the clinics.

Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc. filed a motion to dismiss plaintiffs' second amended complaint for failure to state a claim upon which relief may be granted. For the reasons stated below, the motion is granted in part and denied in part.

DISCUSSION

I. COUNT 1: SECTION ONE OF THE SHERMAN ANTITRUST ACT

Count I of plaintiffs' complaint alleges that defendants Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, PLAL, PDAL, Operation Rescue, Project Life, and Vital-Med have restrained trade in violation of section one of the Sherman Act, 15 U.S.C. § 1. Defendants argue that the objective of their activities is "closing clinics by affecting public opinion, consumers' choices, physicians' revulsion, and legislators' votes," and "to convince others for non-economic reasons that the entire private abortion market ought to be banned, or 'decommodified.'" (Mem. in Support, pp. 13, 24.) Defendants assert that their activity "is non-economic but social, moral and political." (*Id.* at 24.)

The threshold question is whether the Sherman Act was intended to cover the conduct alleged here. Given the unique issue presented by this case, guidance can be gleaned from an examination of United States Supreme Court cases concerning the application of antitrust laws to anticompetitive political conduct.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961), the Supreme Court held that concerted efforts to restrain or monopolize trade in order to petition government officials are protected from antitrust liability. In *Noerr*, the defendant railroads engaged in a publicity campaign with the purpose of fostering the adoption and retention of laws that would be destructive of the trucking business. *Id.* at 527. The Court characterized the publicity campaign as political activity and held that the "proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Id.* at 531. The Court refused to extend the Act to regulate political activities simply because they "have a commercial impact and involve conduct that can be termed unethical." *Id.* Significantly, the Court pointed out the "essential dissimilarity" between the publicity campaign and "agreements traditionally condemned by § 1 of the [Sherman] Act." *Id.* at 529.

Noerr immunity has been most recently discussed by the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1988) and *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S. Ct. 768, 769 (1990) (hereinafter "*D.C. Lawyers*"). In *Allied Tube*, members of the steel industry packed an annual meeting of a private standard-setting association with new members solely to vote against a new type of electrical conduit that posed an economic threat to steel conduit. 108 S. Ct. at 1934-35. The Court found that the Noerr doctrine can immunize indirect as well as direct petitioning of the government. *Id.* at 1938. Applying *Noerr*, the Court focused on the context and nature of the anticompetitive behavior. The Court compared the conduct at issue with conduct classically condemned by the Sherman Act. The Court denied petitioner the use of *Noerr* immunity because petitioner's activity was the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. *Id.* at

1939. Unlike *Noerr,* the behavior was not political activity that bears little if any resemblance to the combinations normally held violative of the Sherman Act. *Id.* at 1940.

The most recent Supreme Court case on *Noerr* immunity confirms the pivotal role that traditional anticompetitive conduct plays in the doctrine's application. In *D.C. Lawyers,* 110 S. Ct. 768, 769 (1990), a group of lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants in District of Columbia criminal cases agreed to stop providing such representation until the District increased group members' compensation. The Court held that the agreement was a boycott that "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act." *Id.* at 774. The horizontal agreement between the lawyers, who were in competition with one another prior to the boycott, constituted a "constriction of supply [which] is the essence of price fixing . . . [and] . . . was unquestionably a 'naked restraint' on price and output." *Id.* at 774-75. Once again, the Court's denial of *Noerr* immunity was based on its classification of the agreement as "classic" anticompetitive conduct as distinguished from political activity.

The court finds great similarity between this case and another case to which NOW was a party. *State of Missouri v. Nat'l Organization for Women, Inc.,* 620 F.2d 1801 (8th Cir. 1980), involved a convention boycott organized by NOW against all states that had not ratified the proposed Equal Rights Amendment. The court asked whether Congress intended to protect free and fair competition from political or social activities that can have the same effect upon competition as the commercial activities of a trust against a business. *Id.* at 1305. After a thorough analysis of the legislative history of the Sherman Act, the court concluded that it was anticompetitive conduct with commercial objectives that Senator Sherman had in mind as the concern of the bill, not anticompetitive conduct by noncompetitors motivated by noneconomic concerns. *Id.* at 1309. The Eighth Circuit in *State of*

Missouri performed an equally thorough study of the relevant case law, the results of which confirmed the court's earlier conclusion that the Sherman Act was intended to regulate anticompetitive conduct that was financial, economic, or commercial objectives. *Id.* at 1313. The court found that, although NOW's boycott was an economic device, it was used in a non-competitive political arena in order to influence legislation and, as such, is not proscribed by the Sherman Act. *Id.* at 1315.

Similarly, a woman's right to have an abortion is a social or political issue—one of the most complex and contentious in American society today. The parties each have clear and loudly publicized views on the issue of abortion. Defendants' actions are not financially or commercially motivated. Defendants have an ultimate objective—legislation prohibiting abortions—and an intermediate goal—injury to abortion clinics. The intermediate goal is one of inflicting economic harm with the hope of achieving the ultimate objective. The intended harm to the relationships between the clinics and their customers parallels the intended injury to the relationship in the *Noerr* case itself between the truckers and their customers. Since the injurious restraint is incidental to a valid effort to influence governmental action, the activity enjoys antitrust immunity even if unethical and deceptive methods have been used. *See Allied Tube,* 108 S. Ct. at 1936-37. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities. *Noerr,* 81 S. Ct. at 531. All of this caution would go for naught of this court permitted an extension of the Sherman Act to regulate the activities at issue simply because those activities have a commercial impact and involve conduct that can be termed unethical. *See id.*

Furthermore, unlike traditional antitrust matters (such as the situations presented in *Allied Tube* and *D.C. Lawyers*), the activities alleged here are not between com-

petitors.[1] *Allied Tube* concerned an agreement between competitors in the conduit industry. *D.C. Lawyers* involved an agreement between competing attorneys. Even in *Noerr*, where immunity was granted, there was an agreement between commercial competitors in the long-distance freight hauling business. Here, as in *State of Missouri*, none of the parties are commercial competitors. The "essential dissimilarity" between the alleged conduct and the conduct traditionally regulated by antitrust laws is of a greater magnitude in this case than that in *Noerr* itself. Thus, the Supreme Court's reasons in *Noerr* for not applying antitrust laws apply with greater weight to this case, which involves political opponents, not commercial competitors, and political objectives, not marketplace goals.

For these reasons, the Court finds that the Sherman Act does not apply to the defendants' anticompetitive actions alleged in the complaint. Accordingly, Count I must be dismissed.

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[1] In paragraph two of the complaint, plaintiffs allege that the parties are competitors in commerce. Plaintiffs state that defendants "established competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies." Although Fed. R. Civ. P. 8(a) requires only "a short and plain statement of the claim," this obscure reference to commercial competition between the parties is the sole allegation in the complaint of the commercial nature of defendants' activities. As such, it does not constitute the "plain" statement necessary to provide notice and state a claim for relief under the Sherman Act.

II. RICO COUNTS

A. SECTION 1962(a)

Count II of plaintiffs' complaint alleges a violation of 18 U.S.C. § 1962(a), which makes it

> unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise. . . .

Plaintiffs allege that defendants received contributions in support of their racketeering activities and that defendants invested that income in the various defendant organizations to further the illegal goals of the organizations. (Complaint, ¶¶ 100-104).

In order to state a claim under § 1962(a), income must be "derived, directly or indirectly, from a pattern of racketeering activity." Plaintiffs claim that the donations received from defendants' supporters were derived from defendants' illegal acts. Plaintiffs state that "[i]t is well-known that the more outrageous and highly-publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive large donations." (RICO Case Statement, p. 22.) The court believes that the receipt of donations from supporters of the defendant organizations does not constitute income derived from a pattern of racketeering activity. The racketeering activity alleged in the complaint is extortion. The extortion was addressed, either directly or indirectly, at clinics and employees and patients of those clinics. Supporters of defendant organizations were not extorted, either directly or indirectly, into contributing to the organizations. While supporters may have contributed in order to promote the extortionate activities of defendants, their contributions in no way were derived from the pattern of racketeering

alleged in the complaint. *See Hemmings v. Barian,* 822 F.2d 688, 692 (7th Cir. 1987) (§ 1962(a) claim fails because the income received was not derived from the racketeering activity alleged in the complaint, but instead was income from sources that were proper and above-board). Thus, plaintiffs' RICO claim under § 1962(a) must fail.

B. SECTION 1962(c)

Count III of plaintiffs' complaint alleges a violation of 18 U.S.C. § 1962(c). A violation of § 1962(c) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 105 S. Ct. 3275, 3285 (1985). In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation of § 1962(c). *Id.*

Defendants contend that RICO requires that the predicate acts or the enterprise be economically motivated. The circuits which have explicitly addressed this issue are in conflict on the need for an economic motive. As noted by Justice White, the Second and Eighth Circuits require a profit-making element, while the Third Circuit does not. *McMonagle v. Northeast Women's Center, Inc.,* 110 S. Ct. 261 (1989) (denial of petition for writ of certiorari) (White, J., dissenting).

The Second Circuit has held that either the predicate acts of racketeering or the enterprise must have some financial motive. *United States v. Ferguson,* 758 F.2d 843, 853 (2d Cir. 1985); *United States v. Bagaric,* 706 F.2d 42, 55 (2d Cir. 1983); *United States v. Ivic,* 700 F.2d 51, 65 (2d Cir. 1983). However, the economic motive need not surmount all other motives.

In *Ivic,* the Second Circuit held that subsection 1962(c) has an economic motive requirement. *Id.* at 60. The

court discussed the use of the term "enterprise" in 1962(a) and (b),[2] concluding that "the term 'enterprise' [in subsections (a) and (b)] quite clearly refers to . . . the sort of entity which one joins to make money. . . . [A]n 'enterprise', as used in these subsections, is evidently an organized profit-seeking venture." *Id.* The court adhered to the rule that when the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will be assumed to have the same meaning in other places. *Id.* Thus, the court found a requirement for a profit-generating motive in subsection (c).

The Eighth Circuit has also held that an enterprise must be directed toward an economic goal. *United States v.* Flynn, 852 F.2d 1045, 1052 (8th Cir. 1988); *United States v. Anderson,* 626 F.2d 1358, 1372 (8th Cir. 1980). In *Anderson,* the Eighth Circuit stated:

> We hold that Congress intended the phrase 'a group of individual's associated in fact although not a legal entity,' as used in its definition of the term 'enterprise' in section 1961(4), to encompass only an association having an ascertainable structure *which exists for the purpose of maintaining operations directed toward an economic goal* that has an existence that can be defined a part from the commission of the predicate acts constituting the 'pattern of racketeering.'

Anderson, 626 F.2d at 1372 (emphasis added). The court in *Anderson* set forth this economic goal requirement as part of its discussion of a distinct enterprise

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[2] Section 1962(a) makes it unlawful to use funds derived from a pattern of racketeering or from the collection of an unlawful debt to acquire an interest in or to establish or operate an enterprise engaged in or affecting interstate or foreign commerce. Section 1962(b) makes it unlawful to acquire or maintain an interest in or control of an interstate enterprise through a pattern of racketeering activity or through collection of an unlawful debt.

requirement. Although the court did not fully explain the reason for the economic goal requirement, the court earlier determined that, as the Second Circuit did in *Ivic*, the meaning of "enterprise" in subsection 1962(c) is the same as in subsections 1962(a) and (b). *Id.* at 1366 n.12.

In *Flynn*, the Eighth Circuit was directly faced with the issue of an economic motive requirement in RICO. The court relied on *Anderson* and *Ivic* when it held that an enterprise must be directed toward an economic goal. *Flynn*, 852 F.2d at 1052. In finding this requirement met, the court noted that the members of the enterprise directed their activities toward controlling St. Louis labor unions, thereby enhancing their own finances and influence. *Id.*

In *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), the Third Circuit focused on the need for an economic motive in a RICO claim that was predicated on violations of the Hobbs Act. In *McMonagle*, a women's health center brought a RICO action against antiabortionist activities for intimidation and harassment of the center's employees and activities. The court held that since no economic motive is necessary under the Hobbs Act, no economic motive is required when the Hobbs Act is used as a predicate under RICO. *Id.* at 1350. Thus, the Third Circuit avoided the question of whether an economic motive was required under the RICO statute itself.

The Seventh Circuit has not directly addressed the issue of an economic motive requirement in RICO. However, in *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986), the Seventh Circuit adopted the Eighth Circuit's definition of "enterprise" found in *Anderson*.[3] Two

[3] This court recognizes that the Seventh Circuit in *Neapolitan* was discussing the requirement for the existence of a RICO enterprise separate from a RICO conspiracy, and was not directly addressing the existence of an economic motive requirement. How-

district judges of the Northern District of Illinois in published opinions have also adopted the *Anderson* definition of enterprise. *See Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F. Supp. 869, 877 (N.D. Ill. 1990) (Aspen, J.); *United States v. Walters*, 711 F. Supp. 1435, 1448 (N.D. Ill. 1989) (Marovich, J.).

In light of the reasoned opinions of the Second Circuit concerning the RICO economic motive requirement, the similar holding of the Eighth Circuit, the questionable reasoning by the Third Circuit, and the Seventh Circuit's apparent adoption of the economically-motivated "enterprise" definition, this court holds that an economic motive requirement exists to the extent that some profit-generating purpose must be alleged in order to state a RICO claim.[4]

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ever, by adopting the definition of "enterprise" from *Anderson in toto*, the Seventh Circuit appears to have approved the requirement that a RICO "enterprise" must exist "for the purpose of maintaining operations directed toward an economic goal." 791 F.2d at 500.

[4] Plaintiffs assert that defendants' "activities have decreased the business of, and/or increased the cost of doing business at . . . clinics." (Complaint, ¶ 105.) The business injuries include increased cost for laboratory services, increased insurance costs for clinics, increased costs for security guards, increased costs for rental space, lost business, and general harassment. (RICO Case Statement, ¶ 15.) The three cases from the Second Circuit and the two cases from the Eighth Circuit discussed herein approach the economic motive requirement as whether the enterprise or pattern of racketeering was profit-generating, and not whether they were cost-enhancing. In fact, the Second Circuit's opinion in *Ivic*, relied on by the Eighth Circuit in *Flynn*, clearly states that a RICO enterprise "is evidently an organized profit-seeking venture." *Ivic*, 700 F.2d at 60. In finding that the government had not met the economic motive requirement, the court determined that the "[d]efendants joined together not to make money." *Id.* No case applying the RICO economic motive requirement has discussed an increase in costs incurred by a plaintiff resulting from a defendant's conduct as a way to meet the requirement. Therefore, this court interprets the economic purpose requirement as an intent by the defendant to generate financial gain for the defendant, and

The Second Circuit's opinions in *Ivic*, *Bagaric*, and *Ferguson* provide three different factual situations which demonstrate the Second Circuit's application of the economic motive requirement. In *Ivic*, defendants were Croation activists who were committed to achieving independence for their homeland. *Ivic*, 700 F.2d at 53. The indictment charged that the "primary object" of the criminal enterprise was to "use terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs." *Id.* at 58.

When the court applied the economic motive requirement to the facts, the court found the requirement unmet:

> Defendants joined together not to make money but . . . to advance the goal of Croatian independence. They undertook to murder Badurina and to bomb the dance studio and the travel agency not to obtain money, but rather to eliminate political opponents, win publicity, or otherwise further their chosen cause.

Id. at 60-61. In a footnote, the court distinguished these facts from cases where terrorist organizations have engaged in robbery or extortion to obtain money to further their activities. *Id.* at 61 n.6.

In *Bagaric*, the government charged members of a Croatian terrorist group with the predicate acts of extorting money from unsympathetic Croatians in order to provide financial support for their other illegal activities. *Bagaric*, 707 F.2d at 46-52. The court found that the predicate acts were "classic economic crime[s]" that "were carried out either to compel payment or in retaliation for refusal to meet appellants' extortionate demands." *Id.* at 58. The government's case involved the extortion of money from "moderate Croatians" to help finance defendants' criminal enterprise. *Id.*

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not as an intent by the defendant to increase costs incurred by the plaintiff.

Similarly, in *Ferguson*, the Second Circuit allowed a RICO prosecution against members of the Black Liberation Army who were charged with predicate acts including armored truck robberies and the use of stolen money to maintain safe houses and to support members of the group. *Ferguson*, 758 F.2d at 853. The court emphasized that, unlike *Ivic*, "the defendants' activities centered around the commission of economic crimes" including ten robberies and attempted robberies of armored trucks in order to obtain money to further their activities. *Id.*

Of the three Second Circuit cases, the instant case is most analogous to *Ivic*. According to plaintiffs' pleadings, the primary objective of the alleged enterprise and its pattern of predicate acts was to drive clinics that perform abortions out of business.[5] While plaintiffs do allege that defendants received monetary benefits from the enterprise in the form of voluntary donations from supporters, this does not meet the level of economic motivation set out by the Second Circuit. In both *Bagaric* and *Ferguson*, the court found that "some financial purpose" existed. The court reasonably labeled the predicate acts of extortion of money, in *Bagaric*, and armored truck robberies, in *Ferguson*, as "economic crimes." In both of these cases, the predicate acts were crimes in which the necessary goal was to obtain money. The money was then to be used to further the central activities of the enterprise.

Here, defendants alleged acts were directed, as in *Ivic*, toward "eradicat[ing] and injur[ing] persons whom they perceived as in opposition to their beliefs." *See Ivic*, 700 F.2d at 58. The motivation for destroying clinic property, threatening clinic employees, and blocking access to clinics, among other alleged acts, was not to obtain

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[5] *See, e.g.*, Second Amended Complaint, ¶¶ 1, 3, 26, 27, 28, 29, 30, 96; RICO Case Statement, ¶ 2, 3, 5(f)(2), 5(g), 8. As *stated in* the RICO Case Statement, "*[t]he predicate acts . . . are related in* that they have been organized and executed . . . to further the enterprises' goal of closing through extortionate acts, all women's health centers that provide abortion services." (¶ 5(g).)

money, but rather to otherwise further their antiabortion cause by limiting the availability of abortion services and winning publicity for their cause. The fact that such activity may have also resulted in an increase in voluntary donations to the enterprise is not sufficient to allege the economic motivation requirement of RICO.

The economic motive requirement would lose all meaning should the courts consider an enterprise to be economically motivated solely because that enterprise happens to receive voluntary donations to support the continuation of racketeering activities directed toward a non-financial objective. If this were the case, a plaintiff in a RICO action could meet the economic motive requirement simply by alleging that the defendant sought to receive some voluntary financial support from bystanders harboring sympathy for the defendant's pattern of racketeering activities and that the defendant was motivated by the possibility of gaining financially from the voluntary contributions of those sympathizers during the course of the activities. This result is nonsensical, and the court refuses to adopt it.

C. SECTION 1962(d)

Count IV alleges a RICO claim under 1962(d). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Since plaintiffs' claims under sections 1962(a) and (c) cannot stand, plaintiffs' section 1962(d) claim must also fail.

III. PENDENT STATE CLAIM

Having dismissed the federal claims in plaintiffs' complaint, all that remains are pendent state law claims. The general rule is that the court should relinquish jurisdiction over any pendent state law claim when the federal claims are dismissed before trial. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 1139, 16 L.Ed.2d

218 (1966). Accordingly, the court dismisses the pendent state claims.

CONCLUSION

For these reasons, defendants' motion to dismiss Count I (under the Sherman Act) and Counts II-IV (under RICO) of plaintiffs' second amended class action complaint is GRANTED. Due to lack of pendent jurisdiction, Counts V-VII of the complaint are DISMISSED. This case is dismissed in its entirety. All pending motions, except for plaintiffs' pending motion to enter final judgment on attorneys' fees, are moot.

ENTER:

James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: May 28, 1991

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 86-C-7888

NATIONAL ORGANIZATION FOR WOMEN, on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Plaintiffs,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INCL., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants.

SECOND AMENDED CLASS ACTION COMPLAINT

NATURE OF THE ACTION

1. This is a civil action pursuant to section 16 of the Clayton Act, 15 U.S.C. Section 26, and section one of the Sherman Antitrust Act, 15 U.S.C. Section 1; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1962; and state law. Plaintiffs seek declaratory and injunctive relief and dam-

ages from defendants who have conspired, among themselves and with others, to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity.

2. In furtherance of their conspiracy, defendants and their co-conspirators have, inter alia, engaged in extortion against, threatened and intimidated clinic personnel and patients; intruded upon the confidential relationship between and invaded the privacy of, the clinics' personnel and patients; trespassed on clinic property, invaded clinics and damaged clinic equipment; blocked ingress and egress to clinics; destroyed clinic advertising; coordinated telephone campaigns to tie up clinic lines; set up appointments under false pretenses to keep legitimate patients from being able to make appointments, to cause clinics loss of income and to gain access to clinics; interfered directly with clinics' business relations, including but not limited to relations with patients, personnel, lessors, medical laboratories and other providers of goods and services; and established competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies.

3. The National Organization for Women ("NOW") sues on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and other women who use or may use the services of such centers. The Delaware Women's Health Organization ("DWHO") and the Summit Women's Health Organization, Inc. ("Summit") sue on behalf of themselves and all other similarly-situated clinics performing abortions that defendants seek to drive out of business through a pattern of concerted, unlawful activity.

JURISDICTION

4. This Court has jurisdiction of this action pursuant to 28 U.S.C. Sections 1331 and 1337. Jurisdiction is additionally conferred by 15 U.S.C. Sections 15 and 25 and by 18 U.S.C. Section 1964. Jurisdiction over the state law claims is conferred by the doctrine of pendent jurisdiction. Plaintiffs' prayers for declaratory relief are authorized by 28 U.S.C. Section 2201.

PLAINTIFFS

5. NOW is a nationwide, non-profit organization with over 200,000 members dedicated to advancing and protecting the legal rights of women. Since its founding in 1966, NOW has had a special, on-going concern for the rights of women to reproductive freedom. Currently, NOW is engaged in a wide variety of efforts at the local, state, and national levels to ensure that women continue to have access to safe, economical abortion and family planning services. As part of NOW's Campaign for Women's Lives, NOW members escort patients at women's health centers, such as the named plaintiff clinics, DWHO and Summit, as well as at other clinics, including the Ladies Center, Inc. in Pensacola, Florida, to help protect them from harassment and intimidation by defendants and others. NOW is incorporated, and has its principal place of business in Washington, D.C.

6. DWHO is a Florida corporation with its principal place of business in Wilmington, Delaware. DWHO operates a women's health center that provides abortions, counseling to help patients explore alternatives to abortion, and a variety of gynecological services such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, and patient education. DWHO was the first out-patient clinic in Delaware of this type. From its inception in 1977 until 1983, it was the only such clinic in Delaware.

7. Summit is a partnership with its principal place of business in Milwaukee, Wisconsin. Summit operates a women's health center that is affiliated with DWHO, which also provides abortions, counseling to help patients explore alternatives to abortion, and a variety of gynecological services, such as pelvic examinations, Pap tests, breast concer screening, birth control counseling, pregnancy testing, and patient education.

8. Clinics such as DWHO and Summit provide safe, low cost abortion services. Approximately three out of four abortion in the United States are preformed [*sic*] at clinics such as DWHO and Summit. A first trimester abortion performed at such clinics costs approximately two to five times less than the same procedure at a hospital.

DEFENDANTS

9. Joseph M. Scheidler is a resident of Chicago. Illinois, and has been the director of defendant Pro-Life Action League, Inc. at all times relevant to the lawsuit.

10. John Patrick Ryan is a resident of St. Louis, Missouri, and was the director of defendant Pro-Life Direct Action League, Inc. until September 25, 1987. He has consented to suit in the Northern District of Illinois.

11. Randall A. Terry is a resident of Windsor, New York. He runs a pregnancy testing and counseling center in Binghamton, New York, and is the Executive Director of Project Life and the national organizer of Operation Rescue. He has engaged in an illegal conspiracy with defendants and others in the Northern District of Illinois, and he has given workshops and speeches, held press conferences and taken other action in the Northern District of Illinois in furtherance of the illegal conspiracy alleged herein.

12. Andrew Scholberg is a resident of the Northern District of Illinois and has been the assistant director of defendant Pro-Life Action League, Inc. since February,

1988. Before that he was the director of the Life and Faminly Center in St. Cloud, Minnesota.

13. Conrad Wojnar is a resident of the Northern District of Illinois. Wojnar runs a number of anti-abortion women's medical clinics in the Chicago area and is the director of the Des Plaines Pro-Life Women's Center.

14. Timothy Murphy is a resident of the Northern District of Illinois. Murphy has been a paid employee of defendant Pro-Life Action League, Inc. since September 1988 and worker as a volunteer for PLAL prior to that date.

15. Monica Migliorino is the director of Citizens for Life in Milwaukee, Wisconsin. She has engaged in an illegal conspiracy with defendants and others in the Northern District of Illinois and has taken action in this district, described in greater detail below, in furtherance of the illegal conspiracy alleged herein.

16. Vital-Med Laboratories, Inc. ("Vital-Med") is an Illinois corporation with its principal place of business in the Northern District of Illinois. Since 1984, Vital-Med or its predecessor has provided pathology testing and other services to DWHO, Summit and their affiliated clinics. Vital-Med is owned by the Washington National Insurance Company and Dr. Samuel S. Shih, in equal shares.

17. Pro-Life Action League, Inc. ("PLAL") is an Illinois corporation with its principal place of business in Chicago, Illinois. Its business consists of disrupting and closing women's health centers that perform abortions through the use of illegal activity.

18. Pro-Life Direct Action League, Inc. ("PDAL") is a Missouri corporation with its principal place of business in St. Louis, Missouri. Its business consists of disrupting and closing women's health centers that perform abortions through the use of illegal activity. The PDAL has consented to suit in the Northren District of Illinois.

19. Operation Rescue ("OR") is an organization comprised of individuals and organizations including PLAL, PDAL, Scheidler, Ryan, Terry, Scholberg, Murphy and others. Its principal offices are located in Binghamton, New York. Its business consists of disrupting and closing women's health centers that perform abortions through the use of illegal activity. Through its leader Randall Terry and other agents and co-conspirators, OR has engaged in the illegal conspiracy complained of herein with its co-defendants and others in the Northern District of Illinois and has taken action in furtherance of the illegal conspiracy in this district.

20. Project Life, Inc. (the "Project") is an organization with its principal place of business in Binghamton, New York. Through its officer Randall Terry and other agents and co-conspirators, the Project has engaged in the illegal conspiracy complained of herein with defendants and others in the Northern District of Illinois and has taken action in furtherance of the illegal conspiracy in this district.

CLASS ALLEGATIONS

21. Plaintiffs DWHO and Summit bring this action on behalf of themselves and all other similarly situated women's health centers in the United States which perform abortions. The prerequisites of Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure are satisfied. The class is so numerous that joinder of all its members is impracticable; there are numerous questions of law or fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief and damages with respect to the class as a whole.

22. Plaintiff NOW brings this action on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and all other women who use or may use the services of such health centers. NOW's women members who use or may use the services of women's health centers that perform abortion have standing in their own right, the interests NOW seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual NOW members in the lawsuit. Furthermore, there is a close relationship between the interests of NOW and the interests of other women who are not NOW members but who use or may use the services of women's health centers that perform abortions, and the ability of such women to represent themselves is limited. Finally, in the case of both the class of NOW's women members who use or may use the services of women's health centers that perform abortions and the class of women who are not NOW members but who use or may use the services of such health centers, the class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law or fact common to the class; NOW will fairly and adequately protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

INTERSTATE COMMERCE

23. Clinics such as DWHO and Summit are engaged in interstate commerce.

24. A substantial portion of DWHO's patients come from states other than Delaware and a substantial portion of Summit's patients come from states other than Wisconsin.

25. A substantial portion of medical supplies and equipment purchased by DWHO and Summit comes from out-of-state sources.

26. Since at least 1984, defendants have agreed and conspired among themselves and with others to drive every clinic in the United States, such as DWHO and Summit, out of business.

27. In pursuit of their goal to drive every clinic out of business, defendants have traveled throughout the country, used inter-state telephone lines and U.S. mail services for the purposes of engaging in, or encouraging others to participate in, unlawful, concerted action, including repeated acts of trespass, extortion and vandalism directed at women's health centers such as DWHO and Summit.

28. Defendant Scheidler has distributed throughout the United States a manual, *Closed: 99 Ways to Stop Abortion,* outlining methods intended to be used to interfere with and stop women's health centers such as DWHO and Summit from operating. Defendant Scheidler's manual encourages the use of unlawful activities and methods to drive women's health centers such as DWHO and Summit out of business.

29. Defendant Scheidler has traveled throughout the country training other persons to use the methods outlined in *Closed: 99 Yays to Stop Abortion* and encouraging them to drive women's health centers such as DWHO and Summit out of business.

30. Defendants Scheidler, Ryan, Terry, Scholberg, Murphy and Migliorino have traveled throughout the country leading efforts to shut down women's health centers such as DWHO and Summit and encouraging the use of unlawful methods to do so.

31. Defendants Scheidler, Scholberg and Murphy use defendant PLAL to carry out their unlawful objectives and activities.

32. Defendant Ryan has attempted to disrupt unlawfully the operations of numerous facilities performing abortions throughout the nation, resulting in Ryan's more than 300 arrests.

33. Defendant Ryan has conducted workshops and training sessions throughout the country designed to encourage other persons to disrupt unlawfully the operations of women's health centers that perform abortions.

34. Defendant Ryan has used defendant PDAL to carry out his unlawful objectives and activities.

35. Defendant Terry has traveled throughout the country encouraging, organizing and training other persons to use unlawful methods to close women's health centsr that provide abortion, including blockades of the centers designed to stop ingress and egress.

36. Defendant Terry uses defendants OR and the Project to carry out his unlawful objectives and activities.

37. Defendants Murphy and Migliorino have shipped stolen laboratory specimens in interstate commerce and used interstate telephone and mail communications to help organize actions designed to intimidate and harass clinics by focusing attention on the stolen specimens in at least six states. Defendant Migliorino has also traveled across state lines for the purpose of accomplishing the theft and the local actions. The actions of Murphy, Migliorino, Scheidler and others have resulted in cancellation of a contract between defendant Vital-Med, the Illinois laboratory from which the specimens were stolen, and DWHO and Summit in Delaware and Wisconsin respectively.

FORMATION OF THE PRO-LIFE ACTION NETWORK

38. On May 10-12, 1984, the first National Pro-Life Conference, entitled "Action for Life," was held in Ft. Lauderdale, Florida. Defendant Scheidler presented a

conference workshop on "Effective Confrontation: A 'How To' of Picketing, Leafletting, Sit-ins and Blitzes." He also spoke at a "Ready for Action" rally. As part of their training, approximately 200 conference participants were taken by bus from the convention to the Women's Awareness Clinic, a clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.

39. The following month, in June 1984, defendants Scheidler, Ryan, PLAL and PDAL and others met in Kansas City, Missouri, to formulate a six-month plan of national activities. The plan included so-called "blitzes" of abortion clinics in which anti-abortionists were to enter the clinics to disrupt their business, to gain media attention and to create a threatening and intimidating atmosphere at the clinics. The plan was designed to close down as many abortion clinics across the country as possible.

40. In April 1985, Action for Life II, the Second Annual Pro-Life Activist Conference was held in Appleton, Wisconsin. At this conference, participants named their coalition of "activists" anti-abortion groups the Pro-Life Action Network ("PLAN"). PLAN adopted an agenda of nationally-coordinated activities, including sit-ins, to shut down the abortion industry and pledged to create "a year of pain and fear" for anyone receiving or performing an abortion. Conference participants were greeted with a marque at the conference site that said "Have a Blast." Many wore firecrackers, to symbolize dynamite, as lapel pins. Defendants Scheidler, Ryan, PLAL and PDAL participated in this national meeting.

41. On March 25, 1986, defendants Scheidler, Ryan, PLAL and PDAL and others led a workshop in Pensacola, Florida, designed to encourage local residents to join them in taking unlawful, concerted action to drive women's health centers out of business.

42. On March 26, 1986, the said defendants and others went to the Ladies Center of Pensacola, Inc., a clinic in Pensacola, Florida which performs abortions, to lead an effort to shut it down. During the course of their efforts, four people, including Joan Andrews and John Burt, stormed the clinic. John Burt injured Linda Taggert, the clinic administrator, and Georgia Wilde, then-president of the Escambia county chapter of plaintiff NOW. Andrews ransacked a medical procedures room, destroying surgical supplies. Both Andrews and Burt had to be subdued by the police. Both had their bail revoked after they returned to the clinic following their arrests. Both were convicted on criminal charges as a result of their actions.

43. In April 1986, defendant Scheidler traveled to Delaware to organize and train persons to use his methods for shutting down women's health centers such as DWHO and to galvanize them into action.

44. On April 11, 1986, in furtherance of the nationwide effort to close down women's health centers that perform abortions, defendant Scheidler unlawfully entered DWHO. Scheidler told the then-clinic administartor, Cathy Connor, that he had come to "case the place" because he and his followers intended to force DWHO to close. He stated that he and others intended to make Delaware the first abortion-free state in the nation. He threatened Conner with reprisals should she refuse to quit her job. Conner subsequently left her job with DWHO in the spring of 1987.

45. On April 12, 1986, defendant Scheidler threatened that anti-abortionists "will get rid of [clinics such as DWHO]. I proclaim that Delaware is going to become the first state in the union to be free of abortion facilities."

46. Defendant Scheidler was arrested and charged with criminal trespass and harassment on April 12, 1986, as a result of his actions at DWHO the previous day. He was subsequently convicted and fined.

47. Later in April 1986, defendants Scheidler, Ryan, PLAL and PDAL participated as organizers and workshop presenters at PLAN's third annual conference in St. Louis, Missouri, sponsored by defendant PDAL. Conference participants adopted goals for the year which included changing their language to refer to "sit-ins" as "rescue missions." The 1986-1987 PLAN Agenda called for "Days of Rescue" in June, August and December 1986, and January and April 1987. Field training for conference participants in rescue missions took place on Saturday, April 19, when 107 were arrested for blocking access to the Regency Park Center, a clinic in St. Louis that performs abortions.

48. On November 28 and 29, 1986, defendants Scheidler and Ryan returned to Pensacola to demonstrate at the Ladies Center and at the home of Judge William Anderson, who had sentenced Joan Andrews for her role in the invasion of the Ladies Center in March, 1986. Defendant Terry also traveled to Pensacola for the demonstrations.

49. On Friday, November 28, several hundred anti-abortionists demonstrated at the Ladies Center for some four hours. Police had to order the demonstrators to let cars through their picket line and onto the Ladies Center property. Seven people were arrested for refusing to move from in front of a truck. After the arrests, the remaining demonstrators moved into the street and stopped traffic. The Escambia County Sheriff's Department had to be called in to help the Pensacola Police Department maintain order.

50. On Saturday, November 29, Scheidler and others addressed a rally followed by a march to the home of Judge Anderson where approximately one hundred protesters gathered. Scheidler went onto the porch of Judge Anderson's home and knocked on the door, but no one answered. Some demonstrators then refused to leave the porch and others left their protest signs behind. When

officers began making arrests, Scheidler hurriedly left as the demonstration erupted into a confrontation with police. One officer was knocked to the ground, another was grabbed from behind by demonstrators attempting to aid people who had been arrested in escaping from the police. An officer's radio was taken from him by a demonstrator, and demonstrators surrounded a police cruiser in which one of those arrested had been placed by officers. Once again the city police requested assistance in crowd control from the Escambia County Sheriff's Department when demonstrators refused to move away from the surrounded cruiser. Eight people were arrested.

51. On December 14, 1986, PLAN held a mini-conference in St. Louis, Missouri, attended by defendants Ryan and Scholberg, among others. Defendants Schiedler sent a tape and received a copy of Scholberg's notes from the meeting, including the goals and guidelines adopted. The mini-conference was held in large part to discuss their concerns over public perception of the incidents November 28 and 29 in Pensacola. Scholberg and Ryan reported to the group that Scheidler might want to distance himself from PLAN for a while.

52. The participants agreed unanimously that one of their goals was to close down abortion clinics. They set out guidelines to ensure better control of PLAN demonstrations in order to improve public perception of the activist anti-abortion movement, improve media relations and promote an impression of unity in their movement. Ryan was named interim leader of PLAN, and it was agreed that some kind of leadership council, including Ryan and Scheidler, should be on the agenda at the next PLAN Convention April 29 to May 2, 1987. The PLAN leaders agreed to meet again on January 21, 1987 in Washington, D.C.

53. From April 30 to May 2, 1987, all of the defendants except Wojnar, Migliorino and Vital-Med took part in the annual PLAN convention in Atlanta, Georgia, in-

cluding field training on Saturday, May 2, 1987. Defendants Scheidler, Ryan, Terry and Scholberg were featured as speakers at the convention. Defendant Murphy attended. Seventy-nine people, including defendant Ryan, were arrested during the field training at the Women's Health Center. A news release from defendants before the Conference stated that they would try to stop abortions at Atlanta clinics "by any and all means available. No abortion clinic will be spared." At a news conference on Friday of the convention, defendant Scheidler said tactics such as blocking entrances of clinics and abrasive confrontations with women seeking abortions were necessary "to take their business away from [the providers]."

54. At the 1987 PLAN convention, a leadership council of five regional representatives was elected including defendants Scheidler, Ryan, Terry along with Andrew Burnett from Portland, Oregon, and Peter Lennox from Atlanta, Georgia. Burnett had been arrested at the 1986 PLAN convention field training; Lennox had attended the PLAN mini-conference in December 1986; and both Burnett and Lennox were featured speakers at the 1987 PLAN convention. The council met during the convention and met again on August 21, 1987 in Washington, D.C.

55. From August 25 through 27, 1988, defendant PLAL sponsored the 1988 PLAN convention in Chicago, Illinois. Defendants Scheidler, Scholberg, Murphy, Migliorino, Terry, PLAL, OR and the Project took part. Scholberg, Murphy and Migliorino were speakers. Defendant Terry also spoke to the convention on the activities of OR and was featured at a PLAN news conference on Friday, August 26 encouraging others to take part in planned field training the next day. On Saturday, August 27, conference participants, including defendants Schiedler, Murphy and others, took part in demonstrations at two clinics in Chicago. At one of the clinics, demonstrators used a tactic which defendant Scheidler

called a "lock and block." Scheidler described it as a new method requiring fewer people to close a clinic. Demonstrators poured glue into the locks of the clinic's doors and locked a Kryptonite bicycle lock on the door handles. Defendant Murphy and another demonstrator also used bicycle locks, positioned around Murphy's neck and the other demonstrator's ankle, to attach themselves to a solid block of concrete which they had placed in front of the clinic door. Sixteen people, including defendant Murphy, were arrested in connection with the blockade of the clinic.

CARRYING OUT PLAN'S AGENDA: OPERATION RESCUE

56. Beginning no later than 1986, the PLAN Defendants and others in PLAN conspired to organize massive sit-ins and clinic invasions at abortion clinics nationwide. Their goal was to block access to the clinics in order to prevent patients and staff from entering or exiting and to create a threatening, intimidating atmosphere and a public image of danger in connection with the clinics. Defendant Terry presented the proposal to the other defendants in November 1986 in Pensacola, Florida.

57. Over a period of months, the plan to blockade clinics, organized under the name Operation Rescue, was discussed and revised. Following a visit between defendants Scheidler and Terry in New York in March 1987, the plan was finalized and brochures were printed showing defendants Scheidler, Ryan, Scholberg, PLAL and PDAL among the co-sponsors of OR.

58. The revised plan for OR was presented at the 1987 PLAN convention. The 1987-88 direct action schedule which came out of the convention included OR actions from April 30 through May 7, 1988, directed at clinics in the New York City area. Field training was scheduled for Thanksgiving 1987 in St. Louis, but at the PLAN leadership council meeting August 21, 1987

in Washington, D.C., defendants and the other organizers decided to change the location to the northeastern United States.

59. On November 28, 1987, PLAN organizers and others affiliated with them took part in an OR field training in Cherry Hill, New Jersey. Some 300 people from over a dozen states blocked access to the Cherry Hill Women's Center. Two hundred eleven were arrested.

60. From May 2 through May 6, 1988, in violation of both state and federal restraining orders, OR conducted four days of clinic blockades in New York City and Hicksville, Long Island. Arrests totalled 503 on Monday, May 2; 423 on Tuesday, May 3; 401 on Thursday, May 5; and 320 on Friday, May 6. Defendant Scheidler served as an official marshal during OR in New York. Defendants Scheidler and Scholberg were among those arrested. Scheidler was reported to have said he was there to see how the New York action was done, since they expected to do an OR action in Chicago as well.

61. On July 19, 1988, a series of OR actions began in Atlanta, Georgia. More than 1,200 participants were arrested during the nearly four months that the actions continued. Felony charges were brought against defendant Terry for inciting police assault and clinic trespass. At least 30 OR participants in Atlanta were arrested on felony charges: 8 for assaulting a police officer; 6 for terroist acts; and 16 for false imprisonment.

62. In early October 1988, PLAN ended the OR actions in Atlanta as it geared up for a National Day of Rescue on October 29, 1988. For the National Day of Rescue, defendants Terry, Schiedler, Scholberg, Murphy, PLAL and PDAL, and other PLAN participants organized simultaneous OR actions in some 40 cities around this country and in Toronto, Canada, blockading clinics and prompting nearly 2,500 arrests.

63. In addition to the foregoing nationally-coordinated OR actions, local OR actions have taken place continu-

ously since the November 1987 filed training in Cherry Hill, New Jersey. More than 9,700 participants have been arrested in OR actions since that time.

THEFT OF FETAL REMAINS

64. Beginning sometime before January 1988, defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, PLAL and others, including one or more employees of Vital-Med, conspired to steal fetal remains located in Vital-Med's research laboratory in Northbrook, Illinois. DWHO, Summit and other clinics had sent the specimens to Vital-Med for pathology testing. Defendants conspired to use the specimens as part of their drive to disrupt the operations of health clinics generally, and the operations of clinics affiliated with plaintiffs DWHO and Summit specifically, by keeping women away from the clinics through threats and intimidation and by interfering with the clinics' relations with the laboratory, lessors and others.

65. For more than six years, Vital-Med had provided services to DWHO, Summit and their affiliated clinics. Pursuant to their contract, Vital-Med performed gross and microscopic pathology testing on the fetal specimens and provided sanitary disposal of the remains.

66. In approximately January 1988, defendant Wojnar received a call from a Vital-Med employee. The employee discussed with Wojnar how fetal remains could be stolen from the laboratory. Following this call, Wojnar discussed the matter with Murphy and, over a period of approximately ten months, continuing until approximately November 1988, Murphy, Migliorino and others, with the complicity of one or more employees of Vital-Med, stole some 4,000 specimens from the laboratory.

67. Murphy and Migliorino each made several trips to Vital-Med and coordinated the actions of other who went with them. They went onto Vital-Med's property and entered the laboratory building, either through a garage

door or, on Sundays when that door was closed, through a side door which was left ajar. Then they would proceed to the loading dock, open sealed storage containers and remove fetal specimens from among other medical waste, and take them from the premises. On at least one occasion, an entire storage drum was stolen, using a hand cart. On one or more occasions, Vital-Med employees saw Murphy and Migliorino but did nothing to stop the thefts.

68. The fetal remains were stored initially at various co-conspirators' homes, including the homes of defendants Scheidler, Murphy, Migliorino, and Wojnar. The stolen storage drum was taken by Murphy to Scheidler's home, where it was stored for several weeks in a playhouse in Scheidler's backyard. Eventually a public storage facility was rented and the drum was moved there. Ultimately, after removing the fetal remains from the drum, Murphy deposited the drum with the remainder of the medical waste in an ordinary garbage dumpster in the Chicago area.

69. In the summer of 1988, Murphy, Migliorino and others sent some of the fetal remains to co-conspirators Frank Avila in Fort Wayne, Indiana; Lucy M. O'Keefe in Chapel Hill, North Carolina; Charlene Crommett in Fargo, North Dakota; Dee Becker, chairwoman of the Delaware Pro-Life Coalition in Wilmington, Delaware, and anti-abortionists in Tallahassee, Florida. Many of the shipments were made by United Parcel Service with the return address of PLAL. Others were shipped by private automobile.

70. In North Carolina, 157 fetuses were shipped by a network of anti-abortionists to O'Keefe, who kept them in her kitchen. O'Keefe made arrangements for a highly-publicized funeral mass and burial on August 23, 1988. In news stories about the incident, defendant Scheidler was widely quoted as stating that the fetuses had been found at a lab in Chicago and that they were "individually

packaged and labelled . . . with the names of the mothers, doctors, dates and places the abortions were performed."

71. In Milwaukee, Wisconsin, Migliorino arranged a September 10, 1988 ceremony and burial for a reported 1,200 fetuses. Migliorino's group and 9 others issued a news release before the events stating that they intended to release the names of the Milwaukee clinics from which the fetal remains had been taken. Defendant Scheidler again confirmed publicly that the fetuses came from Vital-Med. In published news reports, Migliorino stated that 700 of the fetuses came from Summit and another Milwaukee clinic.

72. Migliorino shipped approximately 150 fetuses from Milwaukee to Fargo, North Dakota for burial ceremonies arranged by Crommett. In a press account, Migliorino stated that the fetuses came from the Fargo Women's Health Organization, an affiliate of DWHO and Summit, and had been shipped originally by the Fargo clinic to a suburban area of Chicago where anti-abortions obtained them.

73. In Chicago, Fort Wayne, Wilmington and Tallahassee, similar actions took place. Fetal remains stolen from the lab in Northbrook were sent from the Chicago area, given local burial amidst a media campaign designed to generate negative publicity for women's health clinics generally and for affiliates of DWMO and Summit, specifically.

74. The public statements of defendant Scheidler and the local co-conspirators implied that the clinics were not following proper procedures in disposing of medical waste. They carried the clear threat to suppliers, landlords, doctors and others who provide goods and services to the clinics, that they too could be targeted by defendants for theft and other illegal activity as well as harassment and public controversy.

75. The actions of defendants and their co-conspirators also presented an obvious threat to women who have used, or might in the future consider using the clinics, that their privacy would be invaded and the confidentiality of their treatment breached by having their names and personal, medical information revealed publicly.

76. Vital-Med has now informed the management company for DWHO, Summit and their affiliates that effective January 1, 1989, it would no longer accept fetal specimens from the clinics for analysis. Plaintiffs DWHO and Summit are informed that Vital-Med had been forced by a company referred to as "Washington National" to terminate this relationship with the clinics. On information and belief, the company to which Vital-Med referred is Washington National Insurance Corporation or one of its operating subsidiaries, which owns a 50% interest in Vital-Med, and whose counsel, Craig Edwards, and board member, Edward Cottrell, serve as Secretary and board member, respectively, of Vital-Med.

77. At approximately the same time that she was working on the plan to steal and then publicize the stolen fetal remains, Migliorino also was engaged in a campaign to force the new lessor of Summit to breach its lease with the clinic. Following techniques outlined in defendant Scheidler's book, Migliorino sent letters directly to the landlord and to other tenants, threatening disruption and harassment if Summit weer allowed to move in to the building.

78. Summit's landlord, Jefferson Associates, Ltd., has notified the clinic that it will breach their lease and refuse to let the clinic move into the new premises. The landlord, through Joel S. Lee, the President of its General Partner, Van Buren Management, Inc., has also advised Summit that it was forced by "Washington National" to terminate the lease with the clinic. On information and belief, the Washington National to which the landlord referred is Washington National Development Corpora-

tion or one of the operating subsidiaries of Washington National Insurance Company, which holds a mortgage on the premises which were subject to the Summit lease. Washington National's in-house counsel, Craig Edwards, has confirmed to plaintiff's counsel that he spoke with Joel Lee about the lease, but has stated that he told Lee that Washington National would not withhold its approval of the lease. Summit's current lease has expired. Summit is continuing as a month-to-month tenant at its present location. Summit does not have a new location into which to move.

COUNT I: SHERMAN ANTI-TRUST ACT

79. Count I is brought against defendants Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, PLAL, PDAL, OR, the Project (the "PLAN Defendants"), and Vital-Med.

80. Plaintiffs restate the allegations set forth in paragraphs 1 through 78.

81. The agreement among and the activities of the PLAN Defendants and Vital-Med are designed to, and threaten to, restrain interstate trade.

82. The agreement among and the activities of the PLAN Defendants and Vital-Med have, and threaten to have, an anti-competitive effect.

83. Women's health centers throughout the United States, including DWHO and Summit, have been damaged, and are threatened with damage by reason of the actions of the PLAN Defendants and Vital-Med.

84. Women, including NOW members, who seek abortions and other services offered by women's health centers have been damaged, and are threatened with damage, by reason of the PLAN Defendants' and Vital-Med's actions.

85. The purpose of the PLAN Defendants' and Vital-Med's actions is to force all clinics that perform abortions out of business and to eliminate the choice of abortion for women who are pregnant.

86. The PLAN Defendants' and Vital-Med's actions have forced, and threaten to force, women's health centers that perform abortions out of business.

87. The PLAN Defendants' and Vital-Med's actions have increased the cost, and threaten to increase the cost, of having an abortion by compelling women's health clinics to incur, and to raise their charges to cover, the expense of increased security, higher insurance premiums, high rents, and mounting legal fees, among other things.

88. The PLAN Defendants' and Vital-Med's actions have made it, and threaten to make it, more difficult for women to obtain abortions, birth control, fertility treatment, pregnancy testing, counseling and other gynecological services.

89. Women's health centers whose cost [*sic*] increase are less able to compete with other facilities offering the same or similar services.

90. The PLAN Defendants' and Vital-Med's actions have been designed to interfere with, and threaten to interfere with the on-going business and contractual relationships women's health centers have with patients, laboratories, lessors, doctors, employees, and others.

91. The PLAN Defendants' and Vital-Med's actions have increased, and threaten to increase, the risk of medical complications faced by women who seek abortions by forcing such women to postpone abortions or by exposing such women to a pattern of harassing and intimidating conduct designed to create stress and to stop them forcibly from exercising their choice to have an abortion.

92. NOW has been frustrated, and is threatened with being frustrated, by the defendants' actions in its efforts to ensure that women continue to have access to safe, economical abortions and family planning services. NOW has had to devote significant resources to identify and counteract the defendants' actions.

93. The PLAN Defendants' and Vital-Med's actions violate the right of NOW, DWHO and Summit and all similarly-situated women's health centers, and their current and prospective patients, to be free of restraints and threatened restraints of trade under section one of the Sherman Anti-Taft Act, 15 U.S.C. Section 1.

WHEREFORE, plaintiffs pray that this Court:

(1.) Certify this case as a plaintiffs' class action;

(2.) Declare that the actions of PLAN Defendants and Vital-Med have violated the rights of NOW, DWHO and Summit and all similarly-situated women's health centers, and their current and prospective patients, to be free of restraints of trade under section one of the Sherman Anti-Trust Act, 15 U.S.C. 1;

(3.) Enjoin the PLAN Defendants and Vital-Med from carrying out a concerted effort to drive women's health centers such as DWHO and Summit out of business;

(4.) Enjoin the PLAN Defendants and Vital-Med from using unlawful means to drive women's health centers such as DWHO and Summit out of business;

(5.) Award DWHO, Summit and all similarly situated women's health centers treble damages from the PLAN Defendants and Vital-Med;

(6.) Grant plaintiffs their costs in this action and reasonable attorneys' fees; and

(7.) Grant such other and further relief as the Court deems just and proper.

COUNT II: RICO—SECTION 1962(a)

94. Count II is brought against the defendants Scheidler, Terry, Scholberg, Murphy, PLAL, OR and the Project (the "RICO Defendants") by plaintiffs DWHO and Summit and the class they represent, which reallege paragraphs 1 through 78.

95. PLAN is an enterprise under 18 U.S.C. Section 1961 (4) engaged in and affecting interstate commerce. PLAN is an association of individuals and groups with common purposes, including driving all clinics that provide abortion services out of business and preventing the plaintiff clinics from conducting business. PLAN is wholly distinct from the pattern of racketeering activity engaged in by each defendant.

96. PLAL, OR and the Project are each enterprises under 18 U.S.C. Section 1961 (4) engaged in and affecting interstate commerce. The common purpose of each association is to drive clinics that provide abortion services out of business. PLAL, OR and Project Life are distinct from the pattern of racketeering activity engaged in by each defendant.

97. Defendants Scheidler, Scholberg, Murphy, Wojnar, PLAL, Terry, OR and the Project, each a person under 18 U.S.C. Section 1961 (3), receive income, directly or indirectly, from a pattern of racketeering activity that includes predicate offenses in violation of 18 U.S.C. Section 1951 (the "Hobbs Act"). Defendants conspired to, attempted to or did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics to give up their jobs; doctors involved with affected clinics to give up their economic right to practice medicine at the plaintiff clinics; patients of affected clinics to give up their right to obtain services at the plaintiff clinics; and prospective patients of clinics to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force.

98. Specifically, the RICO Defendants have committed the following predicate acts among others:

a. Attempts, conspiracies to commit and commission of extortion against the Women's Awareness Clinic, its employees, doctors, patients, and prospective patients in Fort Lauderdale, Florida, by persons attending the 1984 national Pro-Life Conference, at which defendant Scheidler presented a workshop;

b. Conspiracy to commit extortion by defendant Scheidler and others associated with him as part of their participaiton in the 1985 PLAN Conference against anyone receiving or performing an abortion;

c. Conspiracy to commit extortion by persons attending a March 25, 1986, workshop let [*sic*] by defendants Scheidler and others associated with defendants in Pensacola, Florida, which organized persons to attempt or commit extortion to drive the Ladies Center and similar women's health centers out of business;

d. Attempted extortion and the commission of physical violence against persons on March 26, 1986, when John Burt physically injured the president of the local NOW chapter and others in the course of efforts by defendants Scheidler, PLAL, and others associated with them to shut down the Ladies Center by committing extortion. John Burt wrongfully threatened and used actual force to induce the employees of affected clinics to give up their jobs; doctors involved with affected clinics to give up their economic right to practice medicine at the plaintiff clinics; patients of affected clinics to give up their right to obtain services at the plaintiff clinics; and prospective patients of clinics to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force;

e. The destruction of medical supplies by Joan Andrews on March 26, 1986 in the course of efforts by defendants Scheidler, PLAL, and others associated with

them to shut down the Ladies Center and in furtherance of a plan to commit extortion by using threatened or actual force or fear to induce the Ladies Center's employees, doctors, patients, and prospective patients to relinquish their economic rights and property interests;

f. Attempts, conspiracies to commit and commission of extortion against the Regency Park Center, its employees, doctors, patients, and prospective patients in St. Louis, Missouri by persons attending the 1986 PLAN Conference, in which defendants participated as organizers and workshop presenters;

g. Attempted extortion by defendant Scheidler on April 11, 1986, when Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic in order to induce the clinic administrator to quit that job;

h. Attempts, conspiracies to commit and commission of extortion against the Women's Health Center, its employees, doctors, patients, and prospective patients in Atlanta, Georgia by persons attending the 1987 PLAN Conference, in which defendants took part;

i. Attempts, conspiracies to commit and commission of extortion at a series of OR actions, including:

(1) A "field training" action on November 28, 1987 and continuous actions since then directed at the Cherry Hill Women's Center in Cherry Hill, New Jersey, in which Terry, OR, the Project, and others associated with them have blocked access to the clinic, among other actions;

(2) Four days of blocking the entry to clinics in New York City and Hicksville, Long Island from May 2 to May 6, 1988. Terry was an organizer and Scheidler served as official marshal for the New York action. Terry, Scheidler and other PLAL employees were among those arrested at the New York actions;

(3) Nearly four months of actions, beginning July 19, 1988, directed against clinics in Atlanta, Georgia. More than 1200 participants in these actions, including Terry and others associated with him, were arrested for charges including inciting police assault, assaulting a police officer, terrorist acts, false imprisonment and trespass;

(4) A 40-city National Day of Rescue on October 29, 1988, organized by defendants Terry, Scheidler, PLAL, OR, the Project and others associated with them to block access to clinics to force and attempt to force clinics to close;

j. Attempts, conspiracies to commit and commisison of extortion in 1988 by defendants Scheidler, Murphy, Migliorino, Wojnar, PLAL, and other associated with them against patients and prospective patients of clinics affiliated with plaintiffs DWHO and Summit. Specifically, (i) Scheidler, Wojnar, Murphy, Migliorino, PLAL and others associated with them conspired to steal and hide the fetuses, and (ii) Scheidler, Murphy, Migliorino, PLAL, and others (a) threatened to disclose confidential information about previous patients of these clinics, in connection with the theft of fetal remains from Vital-Med; and (b) publicized and conducted funeral masses and burials for the stolen fetuses. The said defendants committed the above acts in order to induce fear in prospective patients and thus force them to forego the right to decide where to seek medical services free from pressure by defendants and others;

k. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and others associated with them against doctors working with clinics affiliated with plaintiffs DWHO and Summit. Specifically, the said defendants and others affiliated with them (1) threatened to disclose, and in some cases did disclose the identity of these doctors, in connection with the theft of fetal remains from Vital-Med; and (2) con-

ducted and publicized fetal funerals. The said defendants committed the above acts in order to induce fear in the doctors to force them to forego the economic benefits of their involvement with the clinics; and

l. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and others associated with them against clinics affiliated with plaintiffs DWHO and Summit. Specifically, the said defendants and others (1) illegally stole, hid and transported fetal specimens from Vital-Med in Northbrook, Illinois to Fargo, North Dakota, Ft. Wayne, Indiana, Raleigh, North Carolina, Wilmington, Delaware, and Milwaukee, Wisconsin; (2) threatened to disclose confidential information about patients and the identities of doctors in connection with the theft of fetal remains from Vital-Med; (3) publicized and conducted funeral masses and burials for the stolen fetuses. The said defendants and other affiliated with them committed the above acts to induce the clinics to fear the economic losses that would result both from the invasion of privacy of clinic patients and doctors and from negative publicity associated with the fetal funerals. Thus Scheidler, PLAL, and the others attempted and conspired to force the clinics to stop providing abortion services.

99. Each of the attempts and conspiracies to commit extortion obstructed, delayed, and/or affected interstate commerce insofar as it succeeded. Each of the successful conspiracies to commit or commissions of extortion, and the physical violence committed by John Burt and Joan Andrews in furtherance of plans to commit extortion, obstructed, delayed and/or affected interstate commerce.

100. The income the PLAN Defendants receive from their pattern of racketeering activity includes contributions received by these defendants in support of their extortionate acts. Defendants Scheidler, Scholberg, Murphy and Terry also receive or have received salaries or

other payments and benefits, including, in the cases of Scheidler, Scholberg and Murphy, the personal use of a car owned by PLAL, because of their involvement in the pattern of racketeering activity.

101. Defendants Scheidler, Scholberg, Murphy and PLAL used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income, to establish or operate PLAN and the PLAL.

102. Defendants Ryan and the PDAL used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income, to operate PLAN and the PDAL.

103. Defendants Terry, OR and the Project used or invested, directly or indirectly, income received from a pattern of racketeering activity, or the proceeds from that income to operate PLAN, OR and the Project.

104. Each defendant's violation of 18 U.S.C. Section 1962(a) has injured the business and or property interests of the plaintiffs and the class members. The RICO Defendants' investment of income received from the pattern of racketeering activity or the proceeds therefrom has injured plaintiffs by furthering those illegal goals of PLAN, and/or PLAL, OR or the Project which involve extortionate and anticompetitive activities against abortion providers.

105. Specifically, the RICO Defendants' activities have decreased the business of, and or increased the cost of doing business at DWHO, Summit, and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the right to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.

WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiff's class action; award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

COUNT III: RICO—SECTION 1962(c)

106. Count III is brought against the RICO Defendants and defendant Migliorino by plaintiffs DWHO and Summit and the class of clinics they represent, which reallege paragraphs 1 through 78, and 95 through 105.

107. Defendants Scheidler, Terry, Scholberg, Murphy and Migliorino, each persons under 18 U.S.C. Section 1961 (3), are associated with PLAN by virtue of their involvement in its annual conventions as speakers and in other capacities. Defendants Scheidler and Terry are also associated with PLAN by vitrue of their positions on its leadership council.

108. Defendants PLAL, OR and the Project, each a person under 18 U.S.C. Section 1961(3), are associated with PLAN and are constituent groups that comprise PLAN. In addition, they are associated with PLAN through the roles of their respective current or former directors, Scheidler and Terry, in PLAN.

109. Each RICO Defendant and Migliorino conducted and participated in PLAN's affairs through a pattern of racketeering activity. The predicate acts comprising the pattern of racketeering activities include those acts described in paragraph 99 [*sic*] above. As a consequence of the pattern of racketeering activity, defendants Schiedler, Terry, Scholberg, Murphy, Wojnar and Migliorino, and through them PLAL, OR, and the Project have obtained and maintained significant roles in PLAN.

110. As a result of each defendant's violation of 18 U.S.C. Section 1968(c), plaintiffs have suffered the injuries described *supra* in paragraphs 104-105.

WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

COUNT IV: RICO—SECTION 1962(d)

111. Count IV is brought against the RICO Defendants by plaintiffs DWHO and Summit and the class of clinics which they represent, which reallege paragraphs 1 through 78, 95 through 105 and 107 through 110 above.

112. Defendants Scheidler, Scholberg, Murphy, and Terry conspired with each other and other persons to use the income they received from a pattern of racketeering activity, or the proceeds therefrom, to establish or operate PLAN, in violation of 18 U.S.C. 1962(d). Each of these defendants further agreed to the commission of the extortionate acts from which the above-mentioned income would derive.

113. Defendants Scheidler, Scholberg, Murphy, Migliorino, Terry and on information and belief, Wojnar agreed with each other and other persons to conduct and or participate in the affairs of PLAN. Each of these defendants further agreed to the commission of extortionate acts through which each defendant would conduct and or participate in PLAN's affairs in violation of 18 U.S.C. 1962(d).

114. As a direct result of defendants' conspiracy in violation of 18 U.S.C. section 1962(d), plaintiffs have been injured in their business and or property, as alleged in paragraphs 104-105 above.

WHEREFORE, plaintiffs ask that the Court certify this case as a palintiff's class action, award plaintiffs DWHO and Sumgmit treble damages, to be proved at trial, along with other costs, attorneys' fees, and all grant [*sic*] other relief to which plaintiffs may be entitled.

COUNT V: TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

115. Count V is brought against defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar and the PLAL by DWHO and Summit, on their own behalf and not on behalf of any class. Plaintiffs reallege paragraphs 1 through 78.

116. DWHO, Summit, the Fargo Women's Health Organization, Inc., the Fort Wayne Women's Health Organization, Inc., and the Raleigh Women's Health Organization, Inc. are among nine affiliated clinics (the "WHO Clinics"). The WHO clinics, through their management company, National Women's Health Organization, Inc., had a contract with Vital-Med to provide abortion-related and other pathology services to the clinics. Vital-Med provided services to Summit since 1982 and has had a contractual relationship since 1984. As recently as August 27, 1988, Vital-Med and the WHO claims had agreed on a fee schedule which would govern their contractual relationship in the future.

117. Before defendants engaged in the unlawful acts described above, DWHO and Summit had an expectancy of a valid business relationship with Vital-Med. On information and belief, each defendant was aware of that expectancy.

118. During 1988, defendants schemed to steal and send fetal specimens from Chicago to Fargo, Ft. Wayne, Raleigh, Milwaukee and Wilmington. Defendants or their followers, who knew of Vital-Med's contract with the WHO clinics, agreed with one or more Vital-Med employees that the employee(s) assist the defendants in stealing the specimens. After stealing the fetal remains, the defendants shipped them to a variety of locations across the country, and told the press that the specimens were being taken "home" to be buried. Based on information

provided by the defendants, newspapers named Vital-Med as the source of the specimens.

119. In the week of November 7, 1988, Vital-Med terminated its contract to provide abortion-related pathology services to the WHO clinics. Vital-Med simultaneously wrote to the National Women's Health Organization, Inc. that it enjoyed their working relationship and would continue to provide the clinics with services related to processing PAP smears.

120. Upon information and belief, each defendant intentionally, maliciously and without justification induced Vital-Med to terminate its business with the WHO clinics. Defendants' theft of the specimens was an illegal and improper act designed to induce Vital-Med's termination of its relationship with the WHO clinics.

121. Each defendant's interference with the plaintiff clinics' prospective economic advantage is improper and unjustified. Defendants have committed illegal acts in order to interfere with the plaintiff clinics' business expectancies.

122. As a result of defendants' tortious interference with the ongoing business relationship between the WHO clinics and Vital-Med, the WHO clinics have incurred and will incur damages in obtaining new sources for laboratory testing and medical waste disposal services.

WHEREFORE, plaintiffs ask that this Court award DWHO and Summit compensatory and punitive damages for defendants' tortious interference with their contracts with Vital-Med, costs, and all other relief to which they are entitled.

COUNT VI: TORTIOUS INTERFERENCE WITH EXISTING BUSINESS RELATIONSHIP

123. Count VI is brought against defendant Migliorino by Summit, on its own behalf, and not on behalf of any class. Summit realleges paragraphs 1 through 78.

124. On July 26, 1988, Summit entered into a lease with Jefferson Associates, Ltd. for space in the Jefferson Building to be used as a clinic in Milwaukee, Wisconsin.

125. Defendant Migliorino, who knew of Summit's lease of space in the Jefferson Building, sent a letter dated October 4, 1988 to other tenants in the Jefferson Building and businesses located in the area surrounding the building. This letter threatened controversy and conflicts with anti-abortion activists if Summit were allowed to enjoy the benefits of its lease. Specifically, Migliorino threatened weekly pickets and demonstrations, including sit-ins in the building lobby, chaining building doors closed and blocking doors with cars. She threatened that female business clients of other businesses would be suspected of going to the clinic and would be harassed by so-called sidewalk counselors. She also made reference to the press coverage of the stolen fetal remains and the fetal funeral in Milwaukee to demonstrate the lengths to which she and her associates would go to prevent Summit from operating its business.

126. Migliorino asked the other tenants and businesses to send letters of opposition to Joel S. Lee, President of Van Buren Management, Inc., the general partner of Jefferson Associates, Ltd. She stated that "Joel S. Lee, however, welcomes your protest on this matter and if tenants are opposed, the mortgage lender *will not* approve the lease." (Emphasis in original.) Upon information and belief, the lender was Washington National Development Corporation, a subsidiary of Washington National Insurance Company.

127. Jefferson Associates, Ltd. has now informed Summit that Summit will not be allowed to move into the Jefferson Building pursuant to the lease. Defendant Migliorino has taken credit publicly for causing the landlord to breach the lease.

128. Migliorino intentionally and without justification induced Jefferson Associates, Ltd. to breach its contract

with Summit. Her actions were an illegal and improper inducement of Jefferson Associates, Ltd.'s cancellation of the lease.

129. As a result of defendant's tortious conduct and Jefferson Associates, Ltd.'s resulting breach of contract, Summit has incurred and will incur damages in obtaining a lease for other premises.

WHEREFORE, plaintiffs ask that this Court award Summit damages for defendant's tortious interference with its contract with Jefferson Associates, Ltd., punitive damages, costs, and all other relief to which they are entitled.

COUNT VII: BREACH OF DUTY OF CONFIDENTIALITY

130. Count VII is brought against Vital-Med by DWHO and Summit, which reallege paragraphs 1 through 78.

131. Vital-Med knew that a doctor-patient relationship existed with regard to the fetal specimens sent by the plaintiff clinics to Vital-Med for testing and disposal, and that confidentiality was owed by the clinics and the doctors to the women who had abortions. Vital-Med had a duty of confidentiality to the plaintiff clinics and the women whose fetal specimens were sent for pathology testing and disposal. Nevertheless, Vital-Med failed to establish and follow any security procedures to provide confidentiality regarding the names of the clinics, the doctors and the women who had abortions at DWHO, Summit and their affiliated clinics and to ensure proper sanitary disposal of the remains.

132. As a result of Vital-Med's tortious conduct, DWHO and Summit have incurred and will incur damages.

WHEREFORE, plaintiffs ask that this Court award DWHO and Summit damages, costs and all other relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the persons on the attached Service List, a true and correct copy of Plaintiffs' SECOND AMENDED COMPLAINT by mail, proper postage prepaid, first class, from a United States mail depository located at 200 West Adams Street, Suite 2701, Chicago, Illinois, this 22nd day of September, 1989.

/s/ Fay Clayton
FAY CLAYTON